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William J. Aceves

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The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics

By WILLIAM J. ACEVES*

I am master of the earth but the law is mistress of the sea.

—Emperor Antoninus

Law without force is impotent.

—Pascal

I. Introduction

An analysis of the development of the law of the sea reveals a persistent interaction between law and politics.¹ Each influences the other in a relationship that began soon after mankind first looked out towards the sea.

Maritime states have long been concerned with controlling the sea and protecting their shores. References to legal norms regulating maritime commerce and navigation can be found throughout ancient history.² These norms, however, emphasized jurisdiction (*imperium*)

* William Aceves is a Lecturer and Ford Foundation Fellow in International Law at the UCLA School of Law. He is also a Ph.D student in the Department of Government at Harvard University. He received his J.D. and an M.A. in International Relations from the University of Southern California. The author would like to thank John Setear, George Galdorisi, and Alfred Rubin for their helpful comments on earlier drafts of this Article. All opinions and errors remain the responsibility of the author.

1. For purposes of this Article, law is defined as the body of rules, standards, procedures, and institutions governing the relations between and among states. Politics is defined as the tactical and strategic rationale for state action.

2. See JAMES B. PRITCHARD, *THE ANCIENT NEAR EAST* 16-24 (1958) (describing a dispute between an Egyptian priest and a Phoenician official regarding maritime jurisdiction that was resolved by reference to legal concepts). See generally R.P. ANAND, *ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA* (1982); M.D.A. AZUNI, *THE MARITIME LAW OF EUROPE* (William Johnson trans., 1806); PERCY FENN, *THE RIGHT OF FISHERY IN TERRITORIAL WATERS* (1926); W. Frank Newton, *Inexhaustibility as a Law of the Sea Determinant*, 16 TEX. INT'L L.J. 369 (1981); Gordon Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065 (1983).

rather than ownership (*dominium*). For example, the Greeks and Romans exercised limited grants of authority over maritime regions to regulate maritime commerce.³ This did not imply a right of ownership over the sea. Indeed, the *Digest of Justinian* stated that the sea was common to all, with reference to both ownership and use.⁴

Eventually, maritime states recognized the advantages of claiming sovereignty over the waters surrounding their land territory.⁵ A claim of territorial sovereignty allowed greater control of maritime transit, commerce, and resources. As noted by J.L. Brierly, "[a]t the dawn of international law most maritime states claimed sovereignty over certain seas; Venice claimed the Adriatic, England the North Sea, the Channel, and large areas of the Atlantic, Sweden the Baltic, and Denmark-Norway all the northern seas."⁶ Similarly, C. John Colombos has noted that "[u]p to the end of the eighteenth century there was no part of the seas surrounding Europe free from the claims of proprietary rights by individual Powers, nor were there any seas over which such rights were not exercised in varying degrees."⁷ Throughout this era, the maritime regions were viewed as a web stretching across the world's oceans, porous in some areas, impermeable in others.

The most expansive claims of sovereignty were made by Spain and Portugal. By virtue of two papal bulls in 1493 and the Treaty of Tordesillas in 1494, Pope Alexander VI divided the New World be-

3. See generally ANAND, *supra* note 2, at 11; Leslie Macrae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 CAL. W. INT'L L.J. 181, 183-85 (1983); COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 367 (1911); PITMAN POTTER, *THE FREEDOM OF THE SEA IN HISTORY, LAW AND POLITICS* (1924); Percy Fenn, *Justinian and the Freedom of the Sea*, 19 AM. J. INT'L L. 716 (1925).

4. DIG. 1.8.2.1 (MARCIAN, INSTITUTIONUM 3).

5. Ian Brownlie describes four types of territorial regimes: (1) territorial sovereignty; (2) territory not subject to the sovereignty of any state or states and which possesses a status of its own (e.g., mandated and trust territories); (3) *res nullius*, which is susceptible to acquisition by states but has not yet been placed under territorial sovereignty; and (4) *res communis*, which is not capable of being placed under state sovereignty. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 107 (4th ed. 1990). See generally WILLIAM COPLIN, *THE FUNCTION OF INTERNATIONAL LAW* 30-31, 35-38 (1966); R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* (1963).

6. J.L. BRIERLY, *THE LAW OF NATIONS* 304 (Sir Humphrey Waldock ed., 6th ed. 1984). See generally CHARLES HILL, *THE DANISH SOUND DUES AND THE COMMAND OF THE BALTIC* (1926); Percy T. Fenn Jr., *Origin of the Theory of Territorial Waters*, 20 AM. J. INT'L L. 465 (1926).

7. C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 48 (6th ed. 1967).

tween Spain and Portugal.⁸ In 1604, the Dutch East India Company retained Hugo Grotius to challenge Portuguese claims of absolute sovereignty in the Indies and to justify Dutch access to the region.⁹ In his celebrated treatise, *Mare Liberum*, Grotius defended the freedom of the seas by arguing that the sea cannot be owned.¹⁰ "[T]he sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever."¹¹ Grotius argued that state interdependence compelled unrestricted navigation, because no single nation was completely self-sufficient.¹²

Following Dutch challenges to English attempts to restrict fishing off the coast of England, English and Scottish jurists presented their own legal justification for a restrictive maritime regime. In 1635, John Seldon wrote *Mare Clausum* in support of these restrictions on foreign

8. D.P. O'CONNELL, 1 *THE INTERNATIONAL LAW OF THE SEA* 2 (1982). In 1493, Pope Alexander VI granted to Spain sovereignty over the land territory located to the west of a line running one hundred leagues west of the Cape Verde Islands. The papal demarcation provided the basis for the Treaty of Tordesillas between Spain and Portugal. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 63 (1962). See also BAILEY W. DIFFIE AND GEORGE D. WINIUS, *FOUNDATIONS OF THE PORTUGUESE EMPIRE*, 172-74 (1977). See generally CHRISTOPHER BELL, *PORTUGAL AND THE QUEST FOR THE INDIES* (1974); H. Vander Linden, *Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493-94*, 22 *AM. HIST. REV.* 1 (1916).

9. COLOMBOS, *supra* note 7, at 7.

10. *Mare Liberum* was the twelfth chapter of Grotius' monumental treatise *De Jure Pradae*, which he wrote "to show that war might rightly be waged against, and prize taken from the Portuguese, who had wrongfully tried to exclude the Dutch (and others) from the Indian trade." W.S.M. KNIGHT, *THE LIFE AND WORKS OF HUGO GROTIIUS* 80, 86 (1925). "My intention is to demonstrate briefly and clearly that the Dutch—that is to say, the subjects of the United Netherlands—have the right to sail to the East Indies, as they are now doing, and to engage in trade with the people there. I shall base my argument on the following most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it." HUGO GROTIIUS, *THE FREEDOM OF THE SEAS* 7 (Ralph Magoffin trans., 1916). See generally HUGO GROTIIUS AND INTERNATIONAL RELATIONS (Hedley Bull et al. eds., 1992); Alison Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised*, 19 *FORDHAM L. REV.* 243 (1950).

11. GROTIIUS, *supra* note 10, at 34.

12. *Id.* at 7-9.

God Himself says this speaking through the voice of nature; and inasmuch as it is not His will to have Nature supply every place with all the necessities of life, He ordains that some nations excel in one art and others in another. Why is this His will, except it be that He wished human friendships to be engendered by mutual needs and resources, lest individuals deeming themselves entirely sufficient unto themselves should for that very reason be rendered unsociable.

Id. at 28.

fishing off the English coast.¹³ Seldon argued that the seas could become the exclusive property of coastal states.¹⁴ Referred to as "the battle of the books," this medieval debate graphically illustrates the interaction between law and politics. As noted by Grotius, "[t]here are times when maritime powers want freedom of navigation, and there are times when coastal states wish to claim exclusive ownership over parts or the whole of the oceans. The legal outcome depends upon who dominates whom."¹⁵

Thus, the law of the sea developed through this interaction of competing desires, of claim and counterclaim. D.P. O'Connell described the history of the law of the sea as having been "dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas."¹⁶ O'Connell notes that the tension between these two interests has fluctuated throughout the centuries in response to political, strategic, and economic circumstances.¹⁷

When one or two strong commercial powers dominate or achieve parity of power, the emphasis in practice has lain upon the liberty of navigation and the immunity of shipping from local control; in such ages the seas have been viewed more as strategic than as economic areas of competition. When, on the other hand, great powers have been in decline or have been unable to impose their wills upon smaller States, or when an equilibrium of power has been attained between a multiplicity of States, the emphasis has lain upon the protection and reservation of maritime resources, and consequently upon the assertion of local authority over the sea.¹⁸

Over three hundred years later, U.S. maritime policy continues to evince the inexorable relationship between law and politics.¹⁹ Indeed,

13. JOHN SELDON, *OF THE DOMINION, OR OWNERSHIP OF THE SEAS* (1972). See generally LOUISE F. BROWN, *THE FREEDOM OF THE SEAS* (1919); THOMAS FULTON, *THE SOVEREIGNTY OF THE SEA* (1911) (describing the historical development of English claims of dominion regarding the surrounding seas).

14. SELDON, *supra* note 13, *passim*. See also WILLIAM WELWOOD, *AN ABRIDGMENT OF ALL SEA-LAWES* (1613) (defending the right of a coastal state to protect fisheries).

15. GROTIUS, *supra* note 10, at 15.

16. 1 O'CONNELL, *supra* note 8, at 1.

17. *Id.*

18. *Id.*

19. International law plays an integral role in maritime operations. U.S. Navy regulations require naval commanders to observe international law. Article 0605, Observance of International Law, states:

At all times, a commander shall observe and require his command to observe the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.

the United States Freedom of Navigation (FON) program provides an excellent example of this critical relationship. Established in 1979, the FON program seeks to preserve the freedoms of navigation and overflight by challenging excessive maritime claims whereby coastal states have sought to restrict or eliminate maritime transit.²⁰ The FON program conducts both diplomatic protests and operational assertions to protect U.S. navigational rights. According to a Department of State publication:

The U.S. is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the U.S. protects these maritime rights is through the U.S. Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate U.S. resolve to protect navigational freedoms.²¹

The FON program was established as a result of the compelling relationship between law and politics. Political concerns dictated the need for unrestricted maritime transit and, therefore, the need for a liberal maritime regime that affirmed the freedom of navigation.²² At the

U.S. Navy Regulations, art. 0605, *reprinted in* U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 28 (1957). Similarly, article 1124 states that:

Persons in the Department of the Navy, in their relations with foreign nations, and with the governments and agents thereof, shall conform to international law and to the precedents established by the United States in such relations.

U.S. Navy Regulations, art. 1124, *reprinted in* BURDICK BRITTON, INTERNATIONAL LAW FOR SEAGOING OFFICERS 8 (1986).

20. J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 3-9 (1994). See generally William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 46 NAVAL WAR C. REV. 59 (Spring 1993); BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 112, LIMITS IN THE SEAS: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 1-2 (1992) [hereinafter U.S. DEP'T OF STATE, LIMITS IN THE SEAS].

21. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, GIST: U.S. FREEDOM OF NAVIGATION PROGRAM (Dec. 1988).

22. The implications of a restrictive maritime regime on U.S. navigational freedoms are significant. By asserting territorial sovereignty over maritime regions, a coastal state can limit passage through straits and regulate transit along its littorals. Even more limited grants of sovereignty can still effect the transit of U.S. warships. Moreover, these restrictions limit the power projection abilities of the U.S. Navy. In a March 1988 communication to U.S. naval forces, the Secretary of Defense noted that "maximum maritime naval and air mobility are essential for our military forces to operate effectively. Whether we are discussing NATO strategy or operations in the Pacific theater, our competitive advantage lies in the mobility and flexibility of our maritime naval and air forces." Telegram from the

same time, international legal principles influenced the development of U.S. maritime policy.

This Study examines the Freedom of Navigation program and, more broadly, explores the relationship between law and politics.²³ Section II briefly reviews the development of U.S. maritime policy and its emphasis on the freedom of navigation.²⁴ Section III examines the formation and development of the Freedom of Navigation program. It also reviews several FON challenges, including diplomatic protests and operational assertions. Section IV analyzes the legal bases of the FON program and raises several questions regarding the validity of operational assertions. According to the United States, the FON program is based upon the principal sources of public international law: customary international law and treaty law. Specifically, the rules governing the development of customary international law, as well as the existence of ambiguous provisions in the 1982 Law of the Sea Convention, require the United States to conduct FON operations to protect its navigational rights. Despite this reliance on international legal principles, however, the FON program may be criticized on both legal and normative grounds.

By reviewing the development of U.S. maritime policy, and specifically, the Freedom of Navigation program, this study seeks to acknowledge the compelling interaction between law and politics.

II. U.S. Maritime Policy: An Overview

Throughout its history, the United States has been aware of its dependence on unrestricted passage through the world's oceans. America's geographic position, the locations of its major allies, its reliance on international trade, and the importance of the oceans as

Secretary of Defense to USCINCEUR (Mar. 23, 1988) (declassified Sept. 24, 1991). See generally LEWIS ALEXANDER, *NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT* (1986); MARK JANIS, *SEA POWER AND THE LAW OF THE SEA* (1976); U.S. DEP'T OF DEFENSE, *OCEAN POLICY REVIEW* (1993); George Galdorisi, *The United Nations Convention on the Law of the Sea: A National Security Perspective*, 89 AM. J. INT'L L. 208 (1995); Robert Osgood, *U.S. Security Interests in Ocean Law*, 2 OCEAN DEV. & INT'L L. 1 (1974); Elliot Richardson, *Law of the Sea: Navigation and Other Traditional National Security Considerations*, 19 SAN DIEGO L. REV. 553 (1982).

23. The FON program asserts U.S. navigation and overflight rights. This Article does not examine the issue of overflight rights. For a discussion of overflight rights and the 1982 Law of the Sea Convention, see Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AM. J. INT'L L. 490 (1983).

24. For purposes of this Article, the freedom of navigation includes the right of innocent passage through the territorial sea, transit passage through international straits and archipelagos, and high seas freedoms.

sources of food, energy, and minerals provide a compelling rationale for this traditional reliance on the freedom of the seas.²⁵ In addition, the United States status as a global power is dependent upon its sea power. Writing at the end of the 19th century, Admiral Alfred Thayer Mahan acknowledged the critical relationship between national power, foreign policy, and sea power.²⁶ In his view, no state aspiring for great leadership status could ignore the importance of sea power. More recently, the U.S. Department of Defense noted in the white paper *National Security and the Convention on the Law of the Sea* that "[t]he United States has always been a maritime nation and we must have substantial air and sealift capabilities to enable our forces to be where and when needed."²⁷ To ensure these capabilities, a principal element of U.S. maritime policy is the "[a]ssurance that key sea and air lines of communication will remain open as a matter of international legal right and not contingent upon approval by coastal or island nations."²⁸

The United States support for the freedom of navigation has been a basic tenet of American foreign policy since the founding of the American republic. For example, the United States went to war with the Tripolitan states to uphold the principle of freedom of the seas rather than acquiesce to demands for tribute.²⁹ Similarly, the War of 1812 was fought to assure the sovereignty of American vessels on the high seas and, more importantly, to assert the right of the United States to trade freely with Europe.³⁰

The importance of the freedom of the seas to the United States continued into the 20th century. In response to Germany's policy of unrestricted submarine warfare in the Atlantic Ocean during World War I, the United States emerged from its isolationism and entered

25. Scott Truver, *The Law of the Sea and the Military Use of the Ocean in 2010*, 45 LA. L. REV. 1221, 1227 (1985).

26. See ALFRED T. MAHAN, *THE INFLUENCE OF SEAPOWERS UPON HISTORY 1660-1783* (1965).

27. U.S. DEP'T OF DEFENSE, *NATIONAL SECURITY AND CONVENTION ON THE LAW OF THE SEA* 8 (1994).

28. *Id.*

29. STEPHEN HOWARTH, *TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY 67-78* (1991); SCOTT TRUVER, *THE STRAIT OF GIBRALTAR AND THE MEDITERRANEAN* 7 (1980). See generally GARDNER W. ALLEN, *OUR NAVY AND THE BARBARY CORSAIRS* (1905).

30. HOWARTH, *supra* note 29, at 324. See generally CLIFFORD EGAN, *NEITHER PEACE NOR WAR: FRANCO-AMERICAN RELATIONS, 1803-1812* (1983); REGINAL HORSMAN, *THE WAR OF 1812* (1969).

the European conflict.³¹ Following the war, President Wilson stated in his Fourteen Points that there must be "absolute freedom of navigation upon the seas outside territorial waters, alike in peace and in war, except as may be closed in whole or in part by international action for the enforcement of international covenants."³² Similarly, U.S. concern regarding freedom of the seas played an important role in the deteriorating relations between the United States and Germany prior to World War II.³³

Following World War II, the freedom of navigation was threatened by political rather than military movements. Accelerating developments in the law of the sea challenged U.S. maritime interests.³⁴ Ironically, the actions of the United States provided a significant catalyst to this movement. The 1945 Truman Proclamation asserted U.S. jurisdiction and control over the "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States."³⁵ Following the Truman Proclamation, other coastal states began extending claims of territorial jurisdiction beyond their traditional boundaries.³⁶ For example, states began extending claims of jurisdiction from three miles

31. HOWARTH, *supra* note 29, at 298-320. See generally THOMAS BAILEY & PAUL RYAN, *THE LUSITANIA DISASTER: AN EPISODE IN MODERN WARFARE AND DIPLOMACY* (1975); JAMES W. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* (1920); ROSS GREGORY, *THE ORIGINS OF AMERICAN INTERVENTION IN THE FIRST WORLD WAR* (1971); ERNEST R. MAY, *THE WORLD WAR AND AMERICAN ISOLATION, 1914-1917* (1959).

32. WOODROW WILSON, *THE FOURTEEN POINTS* (1918), reprinted in *MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY* 64-66 (Thomas Patterson ed., 1978).

33. HOWARTH, *supra* note 29, at 357-83. See generally ROBERT A. DIVINE, *THE ILLUSION OF NEUTRALITY* (1962); ARNOLD OFFNER, *THE ORIGINS OF THE SECOND WORLD WAR* (1975).

34. See, e.g., BARRY BUZAN, *SEABED POLITICS* (1976); ROSS ECKERT, *THE ENCLOSURE OF OCEAN RESOURCES* (1979); GEORGE SMITH, *RESTRICTING THE CONCEPT OF FREE SEAS* (1980); Lewis Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 SAN DIEGO L. REV. 561 (1983); E.D. BROWN, *Freedom of the Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, 20 SAN DIEGO L. REV. 521 (1983); W. Paul Gormley, *The Unilateral Extension of Territorial Waters: The Failure of the United Nations to Protect Freedom of the Seas*, 43 U. DET. L. REV. 695 (1966); Keith Lawrence, *Military-Legal Considerations in the Extension of Territorial Seas*, 29 MIL. L. REV. 47, 66 (1965).

35. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945). For a discussion of the events leading to the Truman Proclamation, see ANN HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 18-61 (1981).

36. The rise in new claims can be partially attributed to the significant increase in the number of new coastal states that appeared following World War II. In 1945, there were 65 coastal states; by 1982, there were 137. Alexander, *supra* note 34, at 566.

to twelve miles.³⁷ Some states extended their claims to two-hundred miles.³⁸ In the absence of a uniform maritime regime, the number of expanding and competing claims rose dramatically. This ocean enclosure movement placed significant restrictions on maritime transit of both commercial and military vessels.

In order to clarify the rapidly evolving law of the sea, the United Nations held conferences in 1958 and 1960 to establish a uniform legal framework of maritime law.³⁹ The First United Nations Conference on the Law of the Sea (UNCLOS I) convened in 1958 and resulted in the adoption of four conventions: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; and the Convention on Fishing and Conservation of the Living Resources of the High Seas.⁴⁰ While the conference successfully addressed several issues, no consensus was reached on the critical issue of the breadth of the territorial sea.⁴¹ Indeed, soon after the termination of UNCLOS I, several countries extended their territorial seas from three to twelve miles.⁴² Thus, the Second United Nations Conference on the Law of the Sea (UNCLOS II) convened in 1960 "for the purpose of considering further the questions of the breadth of the territorial sea and fishery limits."⁴³ How-

37. Robert Krueger & Myron Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321, 326 (1979). See generally PHILLIP L. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* (1927); D.P. O'Connell, *The Juridical Nature of the Territorial Sea*, 45 BRIT. Y.B. INT'L L. 303 (1971).

38. For example, Peru announced on Aug. 1, 1947 that it had extended its territorial sea to 200 miles. ROACH & SMITH, *supra* note 20, at 97.

39. See generally *THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS AND READINGS* 18-31, 249-52 (Gary Knight & Hungdah Chiu eds., 1991); ANAND, *supra* note 2, at 176-90. In 1930, the Hague Conference on the Codification of International Law examined several issues relating to the law of the sea. However, it was unable to resolve the issue of the breadth of the territorial sea. Alexander, *supra* note 34, at 564; SMITH, *supra* note 34, at 31-32.

40. The Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 231, 450 U.N.T.S. 82; the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; and the Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

41. See Arthur Dean, *Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 613 (1958); Phillip Jessup, Editorial Comment, *Geneva Conference on the Law of the Sea: A Study in International Lawmaking*, 52 AM. J. INT'L L. 730, 732 (1958).

42. ANAND, *supra* note 2, at 185-86.

43. *Second United Nations Conference on the Law of the Sea*, U.N. Doc. A/CONF.13/L.56 (1958).

ever, this conference failed to establish a definitive rule on the breadth of the territorial sea.⁴⁴

On December 17, 1970, the United Nations General Assembly adopted a resolution calling for the formation of a third conference on the law of the sea, whose goal would be to establish a uniform convention on maritime law.⁴⁵ The United States was a leading force behind the proposed conference because of concerns that the ocean enclosure movement threatened the transit of U.S. warships. The United States was primarily concerned with the proposed extension of the territorial sea from three nautical miles to twelve, the preservation of freedom of navigation through straits, and the concept of archipelagic waters.⁴⁶ According to a U.N. study on naval arms, a treaty on the law of the sea had to reconcile three important interests: the security interests of coastal states, the need to protect the mainly resource-oriented interests of the developing coastal states, and the necessity of preserving the freedom of navigation of ships.⁴⁷

The first session of the Third United Nations Conference on the Law of the Sea (UNCLOS III) met in New York City in December 1973.⁴⁸ After eight years of extensive and often contentious negotiations, the Law of the Sea Convention (1982 LOS Convention) was adopted on April 30, 1982⁴⁹ and opened for signature on December 10, 1982.⁵⁰

The 1982 LOS Convention was a monumental achievement in multilateral negotiations.⁵¹ It codified the breadth of the territorial

44. ANAND, *supra* note 2, at 185-90; D.W. Bowett, *The Second United Nations Conference on the Law of the Sea*, 9 INT'L & COMP. L. Q. 415, 428-35 (1960); Arthur Dean, *The Second U.N. Conference on the Law of the Sea: The Fight For Freedom of the Seas*, 54 AM. J. INT'L L. 751, 772-89 (1960).

45. G.A. Res. 2750, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/Res/2750 (1970).

46. Elliot Richardson, *An American View*, in GREENWICH FORUM IX: BRITAIN AND THE SEA 208, 212 (M.B.F. Ranken ed., 1984) [hereinafter GREENWICH FORUM].

47. *The Naval Arms Race*, U.N. Doc. A/40/535 at 46 (1986).

48. See generally ROBERT FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 32 (1993).

49. *Id.* at 39-40. The Convention was adopted by 130 votes to four, with 17 abstentions. The United States, Israel, Turkey, and Venezuela voted against the Convention while states such as Italy, the Federal Republic of Germany, the German Democratic Republic, the Soviet Union, and the United Kingdom abstained. *Id.* at 40.

50. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), reprinted in OFFICIAL TEXT OF THE UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, U.N. Sales No. E.83.V.5 (1983) [hereinafter LOS Convention].

51. See generally JAMES SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* (1984); *THE 1982 CONVENTION OF THE LAW OF THE SEA* (Albert Koers & Bernard Oxman eds., 1984).

sea at twelve miles while recognizing the right of innocent passage for foreign vessels.⁵² It established a contiguous zone that authorized the coastal state to exercise the control necessary to prevent the infringement of its customs, fiscal, immigration, and sanitary laws within twenty-four miles of its coast.⁵³ It also established an exclusive economic zone that granted the coastal state exclusive jurisdiction over all natural resources within 200 miles of its coast.⁵⁴ It clarified the rights and obligations of archipelagic states as well as the status of straits used for international navigation.⁵⁵ It established a regime for the exploitation of the deep seabed.⁵⁶ In addition, the Convention addressed the protection and preservation of the maritime environment, marine scientific research, and the development and transfer of marine technology.⁵⁷

Despite its interest in codifying the law of the sea, the U.S. delegation at UNCLOS III voted against the 1982 LOS Convention.⁵⁸ While the United States was pleased with the overall make-up of the Convention, it was unwilling to accept the deep seabed mining provisions.⁵⁹ As a result, the Reagan Administration subsequently an-

52. See LOS Convention, *supra* note 50, arts. 3 & 17.

53. See *id.* art. 33.

54. See *id.* arts. 56 & 57.

55. See *id.* pts. III-IV. See generally SEBENIUS, *supra* note 51; THE 1982 CONVENTION OF THE LAW OF THE SEA, *supra* note 51.

56. See generally SEBENIUS, *supra* note 51; THE 1982 CONVENTION OF THE LAW OF THE SEA, *supra* note 51.

57. See generally SEBENIUS, *supra* note 51; THE 1982 CONVENTION OF THE LAW OF THE SEA, *supra* note 51.

58. At the Final Session of UNCLOS III, Thomas Clingan (Head of the U.S. Delegation) noted:

The United States recognizes that certain aspects of the Convention represent positive accomplishments. Indeed, those parts of the Convention dealing with navigation and overflight and most other provisions of the convention serve the interests of the international community. . . . Unfortunately . . . the deep seabed mining regime that would be established by the Convention is unacceptable and would not serve the interests of the international community.

REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 665-66 (Myron H. Nordquist & Choon-ho Park eds., 1983) [hereinafter REPORTS OF THE U.S. DELEGATION].

59. Part XI of the LOS Convention provides that the seabed and ocean floor beyond the limits of national jurisdiction are considered the common heritage of mankind. LOS Convention, *supra* note 50, part XI. No state or natural person can claim or exercise sovereignty over any part of this area. *Id.* More importantly, the Convention established a controversial deep seabed mining regime. For a discussion of this contentious issue, see ALEXANDRA POST, DEEPSEA MINING AND THE LAW OF THE SEA (1983); Charles Biblowit, *Deep Seabed Mining: The United States and the United Nations Convention on the Law of the Sea*, 58 ST. JOHN'S L. REV. 267 (1984); John King Gamble, Jr., *Assessing the Reality of the Deep Seabed Regime*, 22 SAN DIEGO L. REV. 779 (1985); Michael Hardy, *The Law of*

nounced that the United States would not sign the 1982 LOS Convention.⁶⁰ According to President Reagan, the decision to forego the Convention was based on objections to the deep seabed mining provisions.⁶¹ President Reagan indicated, however, that the provisions of the Convention dealing with traditional uses of the oceans confirmed existing maritime law and practice and were consistent with U.S. interests.⁶² A National Security Decision Directive issued in December 1982 stated that while the United States would not sign the Convention, it would "continue to protect U.S. navigation, overflight, and related security interests in the seas through the vigorous exercise of its rights against excessive maritime claims."⁶³

the Sea and the Prospects for Deep Seabed Mining: The Position of the European Community, 17 OCEAN DEV. & INT'L L. 309 (1986); David Larson, *Deep Seabed Mining: A Definition of the Problem*, 17 OCEAN DEV. & INT'L L. 271 (1986).

60. Statement by the President on the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982) [hereinafter President's Statement on the Convention]; BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 416, LAW OF THE SEA AND OCEANS POLICY (July-Aug. 1982). According to President Reagan, there were several problems with the deep seabed mining regime including:

- (1) provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries;
- (2) a decision-making process that would not give the United States or others a role that fairly reflects and protects their interests;
- (3) provisions that would allow amendments to enter into force for the United States without its approval as this is clearly incompatible with the U.S. approach to such treaties;
- (4) stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and
- (5) the absence of assured access for future qualified deep seabed miners to promote the development of these resources.

President's Statement on the Convention, *supra*, at 1-2.

There was a significant debate in the United States about whether to sign the LOS Convention. See, e.g., Richard Hudson, *The "Ripoff for the Rich" in Sea Law Draft*, N.Y. TIMES, Apr. 18, 1981, at A20; William Safire, *The Great Ripoff*, N.Y. TIMES, Mar. 19, 1981, at A23; John Stevenson, *Don't Scuttle the Sea Law; Improve the Draft*, N.Y. TIMES, Apr. 10, 1981, at A30. See generally JAMES MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES (1992); Leigh Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006 (1982); Elliot Richardson, *The United States Posture Toward the Law of the Sea Convention: Awkward But Not Irreparable*, 20 SAN DIEGO L. REV. 505 (1983).

61. National Security Decision Directive No. 43 (July 9, 1982) (declassified Aug. 22, 1990).

62. *Id.*

63. National Security Decision Directive No. 72 (Dec. 12, 1982) (declassified Aug. 10, 1992).

On March 10, 1983, the Reagan Administration released the U.S. Oceans Policy Statement.⁶⁴ President Reagan noted that the United States "has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources."⁶⁵ President Reagan then announced that the United States was prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight—as codified in the 1982 LOS Convention. "In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal [s]tates."⁶⁶ In addition, the United States would exercise and assert its navigation and overflight rights on a worldwide basis in a manner consistent with the Convention. President Reagan warned, however, that "[t]he United States will not . . . acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."⁶⁷

The United States maintained its criticisms of the 1982 LOS Convention throughout the Reagan Administration. In 1984, James Malone, then Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, reiterated the Administration's criticism of Part XI of the Convention.⁶⁸ He added, however, that the provisions regarding navigation codified customary international law. Thus, the United States would "further those acceptable provisions of the convention which are based on customary law as consistently as possible in order to assure other states of U.S. intentions and in order

64. Statement by the President on United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983) [hereinafter President's Statement on U.S. Oceans Policy]. At the same time, President Reagan announced that the United States was proclaiming a 200-mile exclusive economic zone. *Id.* See also BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 471, OCEANS POLICY AND THE EXCLUSIVE ECONOMIC ZONE (Mar. 10, 1983).

65. President's Statement on U.S. Oceans Policy, *supra* note 64.

66. *Id.*

67. *Id.*

68. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 617, FREEDOM AND OPPORTUNITY: FOUNDATIONS FOR A DYNAMIC NATIONAL OCEANS POLICY (Oct. 1984) [hereinafter U.S. DEP'T OF STATE, FREEDOM AND OPPORTUNITY]. See generally James Malone, *Who Needs the Sea Treaty?*, 54 FOREIGN POL'Y 44 (1984).

to promote certainty and stability."⁶⁹ Moreover, in furtherance of President Reagan's earlier pronouncement, the U.S. Navy would continue to exercise its navigational rights and freedoms globally.⁷⁰

In those instances in which coastal state claims are inconsistent with customary law, exercises are openly carried out. If a coastal state protests, the United States by reply note stipulates the navigational right or freedom involved, the manner in which it has been circumscribed, and the U.S. resolve to continue to exercise such rights and freedoms.⁷¹

Ambassador Malone cited two recurring areas that were subject to challenge: requirements of advance notification before entry into the territorial sea and claims to historic bays.⁷²

In March 1986, Assistant Secretary of State for Oceans and International Affairs John Negroponte indicated that the United States still considered the 1982 LOS Convention to be unacceptable because of the deep seabed mining provisions.⁷³ He added, however, that the United States would continue to act in accordance with the balance of interests relating to traditional uses of the oceans.⁷⁴ Secretary Negroponte noted that the main purpose of U.S. maritime policy was to preserve and promote traditional, international navigational freedoms. To secure these freedoms, the United States pursued a three-step policy.⁷⁵ First, the United States conducted bilateral discussions with many countries in order to guide the development of state practice toward acceptance of the international law of the sea as reflected in the 1982 LOS Convention.⁷⁶ Second, the United States began to formally protest what it considered to be excessive claims of other governments in order to preserve its juridical position.⁷⁷ Third, the

69. U.S. DEP'T OF STATE, FREEDOM AND OPPORTUNITY, *supra* note 68, at 3.

70. *Id.*

71. *Id.*

72. *Id.* at 3-4. See generally Yehuda Blum, *The Gulf of Sidra Incident*, 80 AM. J. INT'L L. 668 (1986); L.F.E. Goldie, *Historic Bays in International Law: An Impressionistic Overview*, 11 SYRACUSE J. INT'L L. & COM. 211 (1984).

73. John D. Negroponte, Address at the 10th annual seminar sponsored by the Center for Oceans Law and Policy (Mar. 14, 1986), in BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y No. 819, CURRENT DEVELOPMENTS IN U.S. OCEANS POLICY 1 (May 1986) [hereinafter U.S. DEP'T OF STATE, CURRENT DEVELOPMENTS].

74. According to Secretary Negroponte, "[t]he United States is now engaged in a deliberate, methodical process of promoting the universal application of rules of international law reflected in the nonseabed parts of the convention." *Id.*

75. *Id.* at 1-2.

76. *Id.*

77. *Id.*

United States exercised its maritime rights to illustrate national commitment.⁷⁸ The United States maintained this policy throughout the Reagan and Bush Administrations.⁷⁹

On December 27, 1988, President Reagan announced that the United States would extend its territorial sea from three to twelve nautical miles pursuant to the 1982 LOS Convention.⁸⁰ In his proclamation, President Reagan noted that international law recognizes the right of coastal states to exercise sovereignty and jurisdiction over their territorial seas to twelve miles. The United States would, therefore, extend its territorial sea accordingly. However, the United States also recognized the right of innocent passage through its territorial waters.⁸¹

In 1990, the United Nations began negotiations designed to address the criticisms of the deep seabed mining provisions in the 1982 LOS Convention.⁸² Upon taking office, the Clinton Administration initiated a detailed review of the U.S. position on the Convention. In May 1993, the Administration announced its intention to participate in the U.N. efforts to reform the disputed provisions.⁸³ An agreement was subsequently reached to reform the deep seabed mining provisions.⁸⁴ It was adopted by the U.N. General Assembly on July 28,

78. *Id.*

79. 136 CONG. REC. S5,548-49 (1990). Former Assistant Secretary of State James Malone noted that the Bush Administration continued to pursue the policy established by President Reagan in the 1983 Ocean Policy Statement. *Id.*

80. Proclamation No. 5928, 54 Fed. Reg. 777 (1988). See generally Henry Arruda, *The Extension of the United States Territorial Sea: Reasons and Effects*, 4 CONN. J. INT'L L. 697 (1989).

81. Proclamation No. 5928, *supra* note 80.

82. See generally Jonathan Charney, *The United States and the Revision of the 1982 Convention on the Law of the Sea*, 23 OCEAN DEV. & INT'L L. 279 (1992); David Larson, *An Analysis of the Ratification of the UN Convention on the Law of the Sea*, 26 OCEAN DEV. & INT'L L. 287 (1995).

83. U.S. DEP'T OF DEFENSE, NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA, *supra* note 27, at 3. As a result of extensive interagency review, the Clinton Administration concluded that: (a) the U.S. should provide leadership to find solutions to the Part XI dilemma; (b) the non-seabed provisions of the Convention are the appropriate legal framework for governance of the oceans; and (c) the U.S. should, as a matter of high priority, become an active participant in efforts to reform the Convention. *Id.* See also U.S. DEP'T OF DEFENSE, OCEAN POLICY REVIEW, *supra* note 22, *passim*.

84. The new agreement ensures that the United States has a significant role in determining future decisions regarding possible deep seabed mining. It also requires that the administration of the seabed mining regime to be based on free-market principles. U.S. DEP'T OF STATE, UNITED STATES TO SIGN SEABED MINING AGREEMENT (July 1, 1994). See also Steven Greenhouse, *U.S. Aides Report Compromise on Sea Mining*, N.Y. TIMES, Mar. 10, 1994, at A10.

1994.⁸⁵ U.S. Ambassador to the United Nations Madeleine Albright signed the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea on July 29, 1994 (Agreement).⁸⁶

Subsequently, the Senate Committee on Foreign Relations held hearings on the 1982 LOS Convention and the new Agreement.⁸⁷ In his testimony before the Committee, Assistant Secretary of State for Oceans David Colson noted:

The significance of the new Agreement, which will form an integral part of the Law of the Sea Convention, not only lies in the fact that it solves the specific problems articulated by the United States with respect to Part XI of the Convention. It also opens the door for United States acceptance of the Convention and brings within reach our long-term and bipartisan goal of a comprehensive and widely supported law of the sea convention.⁸⁸

Similarly, John McNeill, Senior Deputy General Counsel for International Affairs and Intelligence for the Defense Department, stated in his testimony that:

[The] Department of Defense [DOD] considers the legal framework which the convention establishes to be essential to its mission. That framework assures our operational mobility and flexibility, helps to avoid conflict and promotes the rule of law. From an operational, policy, and legal perspective, DOD supports the United States becoming party to the convention.⁸⁹

In its 1994 white paper, the Defense Department wrote that the 1982 LOS Convention is favorable because: (1) it confirms traditional high seas freedoms of navigation and overflight; (2) it details passage rights through international straits; and (3) it reduces prospects for disagreement with coastal nations during operations by providing an internationally recognized set of rules concerning operational rights in the marine environment.⁹⁰ "A universal Convention is the best guar-

85. *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, U.N. Doc. A/48/L.60 (1994).

86. Statement by Ambassador Madeleine Albright, Press Release USUN #107-(94) (July 27, 1994).

87. *Current Status of the Convention on the Law of the Sea, Hearings Before the Committee on Foreign Relations, United States Senate*, 103d Cong., 2d Sess. 1 (1994) [hereinafter *Hearings*].

88. *Id.* at 13.

89. *Id.* at 18.

90. U.S. DEP'T OF DEFENSE, NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA, *supra* note 27, at 1-6.

antee of avoiding situations in which U.S. forces must be used to assert navigational freedoms, as well as the best method of fostering growth and use of various conflict avoidance schemes which are contained in the Convention."⁹¹

On October 6, 1994, President Clinton forwarded the 1982 LOS Convention and the 1994 Agreement to the Senate for its advice and consent.⁹² In his transmittal letter, President Clinton noted that "[t]he United States has basic and enduring national interests in the oceans and has consistently taken the view that the full range of these interests is best protected through a widely accepted international framework governing uses of the sea."⁹³ Therefore:

91. *Id.* at i. The Department of Defense (DOD) white paper added that "[r]eliance upon customary international law in the absence of the modified Convention would represent a necessarily imprecise approach to the problem as well as one which requires the United States to put forces into harm's way when principles of law are not universally understood or accepted." *Id.* According to John Stevenson & Bernard Oxman, Comment, *The Future of the United Nations Convention on the Law of the Sea*, 83 AM. J. INT'L L. 483, 492 (1994):

[G]overnments are more inclined to respect obligations to which formal consent has been given by the highest political authorities. Even if the Convention is now generally declaratory of customary international law, this leaves much room for argument about important details. . . . [W]ithout widespread ratification, inevitable 'violations' are more easily interpreted as evidence that state practice, the ultimate source of customary law, is not necessarily rooted in the Convention.

Id.

92. S. Treaty Doc. No. 39, 103d Cong., 2d Sess. III-IV (1994). See also Marian Nash (Leich), *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 112 (1995).

93. Leich, *supra* note 92, at 112. In the transmittal letter, President Clinton stated that the primary benefits of the LOS Convention to the United States include the following:

The Convention advances the interests of the United States as a global maritime power. It preserves the right of the U.S. military to use the world's oceans to meet national security requirements and of commercial vessels to carry sea-going cargoes. It achieves this, *inter alia*, by stabilizing the breadth of the territorial sea at 12 nautical miles; by setting forth navigation regimes of innocent passage in the territorial sea, transit passage in straits used for international navigation, and archipelagic sea lanes passage; and by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond.

The Convention advances the interests of the United States as a coastal state. It achieves this, *inter alia*, by providing for an exclusive economic zone out to 200 nautical miles from shore and by securing our rights regarding resources and artificial islands, installations and structures for economic purposes over the full extent of the continental shelf. These provisions fully comport with U.S. oil and gas leasing practices, domestic management of coastal fisheries resources and international fisheries agreements.

As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping, and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world's oceans.

[e]arly adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea, which covers more than 70% of the surface of the globe. Maintenance of such stability is vital to U.S. national security and economic strength.⁹⁴

Thus, President Clinton recommended that the Senate give early and favorable consideration to the 1982 LOS Convention and the Agreement.

The 1982 LOS Convention entered into force for member states on November 16, 1994.⁹⁵ The Agreement Relating to the Implementation of Part XI provides for its provisional application on that date pending its formal entry into force. Article 2 of the Agreement provides that the Agreement and Part XI of the 1982 LOS Convention shall be interpreted and applied together as a single instrument.⁹⁶ It adds, however, that in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement shall prevail.⁹⁷

In light of the essential role of marine scientific research in understanding and managing the oceans, the Convention sets forth criteria and procedures to promote access to marine areas, including coastal waters, for research activities.

The Convention facilitates solutions to the increasingly complex problems of the uses of the ocean—solutions that respect the essential balance between our interests as both a coastal and a maritime nation.

Through its dispute settlement provisions, the Convention provides for mechanisms to enhance compliance by Parties with the Convention's provisions.

Id. at 112-13.

The report submitted by Secretary of State Warren Christopher to the President stated that "[t]he interested Federal agencies and departments of the United States have unanimously concluded that our interests would be best served by the United States becoming a Party to the Convention and the Agreement." S. Treaty Doc. No. 39, 103d Cong., 2d Sess. V-XI (1994).

94. S. Treaty Doc. No. 39, *supra* note 93.

95. Article 308 of the LOS Convention provides that it will enter into force one year from the date that a 60th instrument of ratification is deposited with the Secretary General of the United Nations. LOS Convention, *supra* note 50, art. 308. A 60th instrument of ratification was deposited on November 16, 1993. As of April 1995, 74 states were parties to the LOS Convention. See generally Jonathan Charney, *Entry Into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT'L L. 381 (1995).

96. LOS Convention, *supra* note 50, art. 2.

97. *Id.* See generally D.H. Anderson, *Legal Implications of the Entry Into Force of the U.N. Convention on the Law of the Sea*, 44 INT'L & COMP. L.Q. 313 (1995); *Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea*, 88 AM. J. INT'L L. 488 (1994).

III. The Freedom of Navigation Program

Freedom of navigation has been the principal objective of U.S. maritime policy throughout the history of the United States. Thus, the development of the Freedom of Navigation program is a natural extension of this policy.

A. *The Origins of the FON Program*

The origins of the Freedom of Navigation program can be found in the negotiations conducted during UNCLOS III. Specifically, the development of the FON program was motivated by two events which occurred during UNCLOS III: a 1977 National Intelligence Estimate study on expanding maritime jurisdiction and the renegotiation of the Informal Composite Negotiating Text (ICNT).

Soon after his appointment as President Carter's Special Representative to the Third United Nations Conference on the Law of the Sea, Elliot Richardson became concerned by the continuing proliferation of territorial claims by coastal nations.⁹⁸ According to Ambassador Richardson, the effective deployment of the U.S. Navy required a unified, international consensus on the law of the sea.⁹⁹ The Ambassador believed that U.S. insistence that the freedom of navigation was essential, or that the United States was prepared to assert its rights against objectionable claims, would be insufficient to protect U.S. interests.¹⁰⁰ Specifically, "[i]f deployments to distant regions of the world require the U.S. to defy the claims of states along the way, they entail a high risk of political, economic or even military conflict."¹⁰¹ Thus, Ambassador Richardson argued that the United States had a significant interest in promoting the development of a widely accepted body of international law for the oceans.¹⁰²

98. Alan James, *A Response to Professor Goldie: The Quest for Ocean Law and the American Experience*, 1 INT'L PROP. INVESTMENT J. 409, 413 (1983).

99. Department of State Press Release, No. 171, 2-12 (July 13, 1979). The Joint Chiefs of Staff supported U.S. participation in UNCLOS III in order to preserve maximum operational mobility and flexibility of U.S. forces around the world, at minimum political and economic cost. Colonel W. Hays Parks, *Crossing the Line*, 112 NAVAL INST. PROC. 40, 42 (1986).

100. "Our strategic objectives cannot be achieved unless the legitimacy of these principles is sufficiently accepted by the world at large so that their observance can be carried out on a routine operational basis." Department of State Press Release, *supra* note 99.

101. *Id.*

102. In 1976, Secretary of Defense Donald Rumsfeld had noted in testimony before the Senate that the Carter Administration's concerns with the mounting legal threats presented by the ocean enclosure movement. According to Secretary Rumsfeld:

Due to these concerns, Ambassador Richardson commissioned several U.S. intelligence agencies to conduct a study regarding the national security implications of the growing proliferation of excessive maritime claims.¹⁰³ He requested the study in order to show that the "creeping jurisdictions" problem was a matter of significant national security concern.¹⁰⁴ The resulting National Intelligence Estimate (NIE), prepared by the National Security Intelligence Group, indicated that a widely accepted law of the sea treaty might be useful in limiting the proliferation of state claims. However, the NIE study concluded that such a treaty would not be sufficient to safeguard U.S. navigational freedoms.

Another factor that influenced the development of the Freedom of Navigation program occurred at the conclusion of the sixth session of UNCLOS III, which took place from May 24 to July 15, 1977.¹⁰⁵ During the sixth session, negotiations by the Committee I (Seabed) delegates, under the direction of Jens Evensen, increased the overall attractiveness of the deep seabed mining provisions.¹⁰⁶ While the Committee I negotiations did not resolve the fundamental problems regarding deep seabed mining, the resulting "Evensen" text was generally viewed as a useful basis for further negotiation.¹⁰⁷ As Ambassador Richardson noted, the text "offered real prospect that the impasse on seabed mining issues could be resolved on terms acceptable to both the developed and developing nations."¹⁰⁸ However, when the Informal Composite Negotiating Text was released following the conclusion of the sixth session, the Evensen text on seabed mining had been significantly altered by the Chairman of Committee I, Paul Engo.¹⁰⁹ The new text had been drafted without consulting the

As we enter the last quarter of the 20th Century, the legal and political restrictions placed on freedom of mobility are changing the world and impacting on our strategic mobility capability. Our position in the Law of the Sea negotiations stresses, among other things, unimpeded transit through and over international straits. This principle applies to surface movements as well as to overflight. Without this freedom, our mobility and logistic resupply in future contingencies could be impeded.

Hearing Before the Senate Comm. on Appropriations, 94th Cong., 2d Sess. 363 (1976).

103. MARKUS SCHMIDT, *COMMON HERITAGE OR COMMON BURDEN?* 132-33 (1989).

104. Letter from Elliot Richardson to William Aceves (June 11, 1990) (on file with author) [hereinafter Richardson correspondence].

105. See Reports of the U.S. Delegation, *supra* note 58, *passim*.

106. *Id.*

107. SCHMIDT, *supra* note 103, at 134.

108. DEP'T ST. BULL., Sept. 19, 1977, at 390.

109. U.N. Doc. A/CONF.62/WP.10; see also REPORTS OF THE U.S. DELEGATION, *supra* note 58, at 162-84.

developed countries and placed heavier financial and economic burdens on them.¹¹⁰

According to Ambassador Richardson, the composite text was now fundamentally unacceptable and could not be viewed as a responsible contribution to further negotiation. As a result, he recommended to President Carter that the United States undertake a careful review of the substance and procedure of UNCLOS III.¹¹¹ To strengthen its bargaining position at the Conference, the U.S. negotiating team emphasized that the United States could easily dispense with the treaty.¹¹² Ambassador Richardson abandoned the position he had taken with the House Armed Services Committee, the Senate, and the Navy League to promote the Conference. He also reversed the Administration's position on seabed mining legislation in order to create the impression that the United States was prepared to go ahead with deep seabed mining under domestic legislation.¹¹³

In late 1977, Ambassador Richardson and Richard Darman, Vice-Chairman of the U.S. Delegation, drafted a proposed mini-treaty to be developed outside the framework of UNCLOS III that would be brought into effect only if the Conference did not reach a satisfactory agreement.¹¹⁴ The substance of the mini-treaty was disclosed in Darman's 1978 article *The Law of the Sea: Rethinking U.S. Interests*.¹¹⁵ The article emphasized that the failure to achieve a comprehensive law of the sea agreement would not hinder U.S. strategic interests. Indeed, he posited that it might prove beneficial to the United States. Darman suggested that if an acceptable agreement could not be reached, the United States should wait for a more favorable negotiating climate, while continuing deep seabed mining within the framework of a mini-treaty.¹¹⁶ As to the protection of navigational freedoms, Darman noted that the legal status of foreign waters would not be a determinative constraint on U.S. foreign policy. If

110. SCHMIDT, *supra* note 103, at 135.

111. DEP'T ST. BULL., *supra* note 103, at 390.

112. Richardson correspondence, *supra* note 104, at 1.

113. SCHMIDT, *supra* note 103, at 136-37.

114. Richard Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFF. 373, 393 (1978). See generally, H. GARY KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD LAW OF THE SEA CONFERENCE (1976); THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES 133-48 (Ryan Amacher & Richard Sweeney eds., 1976); Anthony D'Amato, *An Alternative to the Law of the Sea Convention*, 77 AM. J. INT'L L. 281 (1983).

115. Darman, *supra* note 114, at 393.

116. *Id.* at 395.

the United States felt compelled to move militarily, it would presumably do so regardless of international law.¹¹⁷

According to Ambassador Richardson, while the idea of the mini-treaty was useful in the negotiating process, it was never considered a realistic option. The mini-treaty was introduced at that stage of the negotiations because the United States was "seeking to exert every possible pressure on the Conference to make concessions on seabed mining, and in the process attempted to create as much verisimilitude as possible for the perception that the United States and other industrialized countries were prepared to go forward outside the Treaty."¹¹⁸ Ambassador Richardson added that the mini-treaty was "a device by which to give colleagues from the Third World in the Conference a basis for the belief that we did have an alternative outside the Convention."¹¹⁹

By 1978, a growing consensus was developing that the United States should be prepared to assert its navigational rights, even if the execution of such rights would conflict with the territorial claims of other coastal states. Throughout UNCLOS III, the Defense Department had not conducted naval and air maneuvers in disputed waters in deference to the ongoing law of the sea negotiations. However, naval officials began arguing that the United States should no longer refrain from exercising its perceived maritime rights.¹²⁰ This concern was shared by Ambassador Richardson who felt that the United States was not reacting consistently to territorial claims perceived to be incompatible with U.S. maritime rights.¹²¹

As a result, Ambassador Richardson persuaded National Security Advisor Zbigniew Brzezinski to set up a task force to examine the possibility of ensuring U.S. navigational freedoms without concluding a treaty, and to develop a systematic approach to the regular exercise of these freedoms.¹²² The study recommended a "show of the flag" to demonstrate American resolve towards its rights under international

117. *Id.* at 377.

118. GREENWICH FORUM, *supra* note 46, at 210-11. Richardson noted, however, that while the notion of the mini-treaty was a useful one at that stage of the negotiations, "it was never realistic, any more than was, and is, the reciprocal deep seabed mining legislation which has been adopted by Britain, Japan, France, Germany and the United States." *Id.* at 211.

119. *Id.*

120. SCHMIDT, *supra* note 103, at 144.

121. Elliot Richardson, *Dogfight: A Lesson for U.S.*, N.Y. TIMES, Aug. 30, 1981, at E17.

122. SCHMIDT, *supra* note 103, at 136-37.

law.¹²³ It also recognized that a proliferation of maritime claims which purported to limit navigation and overflight rights beyond three miles might endanger U.S. interests.¹²⁴ In March 1979, Brzezinski directed the Department of Defense to develop a plan for implementing the Task Force recommendations.¹²⁵ The plan was worked out by the Joint Chiefs of Staff and approved by Brzezinski.¹²⁶ In July, the Joint Chiefs sent directives to Navy and Air Force commanders instructing them that they were authorized to approach coastal states to within three miles.¹²⁷

B. The Initiation of the FON Program

In August 1979, the Commander in Chief, U.S. Atlantic Command (CINCLANT) forwarded a classified memorandum on the Freedom of Navigation program to naval units of the Atlantic fleet.¹²⁸ According to the communication, the United States was concerned that many countries were beginning to assert jurisdictional boundaries that far exceeded traditional claims. The FON program had been established to warn countries that the United States would not tolerate claims having an adverse impact on maritime transit. The memorandum stated that "in the future, there will be planned exercises, transits and overflights by Naval and Air Forces for the purposes of asserting U.S. rights in the face of excessive claims."¹²⁹ According to the CINCLANT communication, U.S. maritime policy would now protest:

- all territorial sea claims in excess of twelve nautical miles and selected claims between three and twelve nautical miles, especially those that overlap an international strait.
- all claims inhibiting navigation through waters that the United States views as a high seas corridor.
- all claims requiring advance notification for warships, or that restrict warship passage in any way.
- rules for "innocent passage" through territorial seas which are substantially different from established provisions.

123. *Id.* at 144.

124. Bernard Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session*, 74 AM. J. INT'L L. 1, 9 (1980).

125. SCHMIDT, *supra* note 103, at 136-37.

126. OXMAN, *supra* note 125, at 9.

127. *Id.*

128. Jack Dorsey, *U.S. To Challenge Sea Limits*, LEDGER STAR, Aug. 7, 1979, at A1; *U.S. Will Challenge Coastal Sea Claims That Exceed Three Miles*, N.Y. TIMES, Aug. 10, 1979, at A1.

129. According to the CINCLANT communication, all ships and aircraft were required to keep detailed records of such transits and overflights. *Id.*

- assertions of jurisdiction beyond the territorial sea.
- all claims of archipelagic states.
- certain baseline and historic bay or water claims on a case-by-case basis, especially those of Argentina, Uruguay, Libya, the Philippines, and Burma.¹³⁰

U.S. forces were ordered to avoid operating in a manner which might be construed as acquiescent to claims inconsistent with U.S. maritime rights.¹³¹ For example, the memorandum noted that because the United States believed that the right of innocent passage through the territorial sea may not be subject to a requirement of prior notification, such notification would not be given to a coastal state before U.S. warships entered its territorial waters.¹³² Indeed, the memorandum added that in certain instances, U.S. forces must consider going out of their way to contest a maritime claim.¹³³ However, the CINCLANT memorandum noted that while the United States must ensure that it is seen as unequivocally exercising its rights, it must avoid any irrational disposition of force and not challenge claims in an aggressive manner.¹³⁴

The Group of Coastal States at UNCLOS III expressed "surprise and concern" with the announcement of the Freedom of Navigation program.¹³⁵ The vice-chairman of the Group of Coastal States noted in a letter to the president of the Conference that the policy was unacceptable and contrary to international law.¹³⁶

In the view of the [G]roup of [C]oastal [S]tates, such a policy, which in its essentials has been confirmed by officials of the United States Government, is highly regrettable and unacceptable, being contrary to customary international law, whereby a great majority of States exercise full sovereignty in their territorial seas up to a limit of 12 nautical miles, subject to the right of innocent passage. That policy

130. *Id.* at A1, A4.

131. *Id.* at A1.

132. *Id.*

133. *Id.*

134. At the time, specific instructions went out to challenge the claims of Argentina, Burma, Libya, the Philippines and Uruguay. Neither the Soviet Union nor China were specifically targeted at the time although they both asserted excessive maritime claims. Interestingly, at the time of the announcement, the U.S. destroyers *Caron* and *Farragut* were conducting a "show the flag" cruise through the Black Sea. *U.S. Will Challenge Coastal Sea Claims That Exceed Three Miles*, *supra* note 128, at A1; *Soviet, in 2 Incidents, Takes U.S. Torpedo and Bait Ships*, N.Y. TIMES, Aug. 11, 1979, at A4.

135. The Coastal States Group consisted of 76 coastal states and included both developed and developing countries. United Nations Convention on the Law of the Sea 1982: A Commentary 70-71 (Myron Nordquist ed. 1993).

136. U.N. Doc. A/CONF.62/90 (1979).

is also inconsistent with the prevailing understanding at the United Nations Conference on the Law of the Sea which has recognized the validity of such a practice.¹³⁷

Similarly, the Foreign Ministers of Chile, Columbia, Ecuador and Peru declared that they did not agree with the manifestations of the FON program which was "seemingly based on aggressive intentions."¹³⁸ They added "that anyone seeking to trespass on the maritime zones where they exercise their sovereignty and jurisdiction rightfully, peacefully and without prejudice to the freedom of communication would be answerable for any violation of those rights."¹³⁹ Angola, Argentina, Brazil, China, Columbia, Costa Rica, El Salvador, the Philippines, Romania, the Soviet Union, and Vietnam also made statements criticizing the U.S. program.¹⁴⁰

In defending the FON program at the UNCLOS III negotiations, the U.S. delegation noted that the program was intended merely to give consistent and non-provocative application to the U.S. view of international law—that so long as there was no universal acceptance of some clear definition of the territorial sea, the United States was bound to assert its own view.¹⁴¹ According to Ambassador Richard-

137. *Id.* The letter added that:

[t]he group has taken note of the clarification which was later made by officials of the United States Government to the effect that there has been no order to challenge in an aggressive way the claims of other nations. However, the group considers the statement that the regime of high seas commences beyond three miles is clearly an anachronism.

Id.

138. U.N. Doc. A/CONF.62/85 (1979).

139. *Id.*

140. U.N. Doc. A/CONF.62/SR. 118 (1979). The Soviet representative noted that the Group of Coastal States was justified in its anxiety. At the same time, the Soviets expressed concern at the attempts to justify the 200-mile limit. The Angolan delegation supported the coastal states' position by saying that it was unacceptable that any state should take unilateral action which could prejudice the outcome of the Conference. The Vietnamese delegate noted that the U.S. program constituted both a violation of international law and practice and an attack on the sovereignty of the coastal state. In fact, Vietnam promised to take appropriate measures to protect its full sovereignty over the territorial sea, continental shelf and other maritime zones under its jurisdiction. *Id.*

141. Following the disclosure of the FON program, State Department and Pentagon officials revealed that the United States had not conducted assertive maritime maneuvers for several years so as not to upset the UNCLOS III negotiations. They also noted that the United States established the Freedom of Navigation program because operational protests involving ships and aircraft are considered far more effective than diplomatic protests. *U.S. Will Challenge Coastal Sea Claims That Exceed Three Miles*, *supra* note 128, at A1; Elliot Richardson, *Power, Mobility, and the Law of the Sea*, 58 FOREIGN AFF. 902 (1980). In 1985, the U.S. government decided not to publicize FON operations because senior officials felt that such action could result in political controversy. This decision was re-

son, "[a]ctivities in the oceans by the United States are fully keeping with its long-standing policy and with international law, which recognizes that rights which are not consistently maintained will ultimately be lost."¹⁴² In 1980, Ambassador Richardson noted that the disclosure of the program served as an abrupt reminder of why UNCLOS III had been convened in the first place:

[The program has been developed in order to challenge] rapidly expanding coastal state claims over ocean space and the impact of these on traditional freedoms of maritime travel and the movement of military and peacekeeping forces. In effect, the old alliance among peacekeeping powers, the global peacetime mobility of military forces, and a universal system of ocean law has been disintegrating. Its renewal, under terms appropriate to the present, remains an essential task of the Conference, and one in which not only the United States but all nations have a major stake.¹⁴³

The importance of the FON program in securing U.S. maritime rights increased significantly when the Reagan Administration announced that the United States would not sign the 1982 LOS Convention. According to the State Department, "[t]he U.S. decision not to become a party to the Law of the Sea (LOS) Convention makes all the more necessary a clear assertion of our rights and a revitalized and more effective navigation and overflight program."¹⁴⁴ Therefore, "[t]he essential objective of the USG [United States Government] navigation program was and remains to exercise our rights in the face of excessive maritime claims in order to protect, through such practice, the international legal principles upon which our navigation and overflight rights and freedoms are based."¹⁴⁵ In a National Security Directive, President Reagan announced that U.S. interests were to be protected against the following categories of excessive maritime claims:

1. Historic bay or historic water claims that are not recognized by the United States.

versed in 1988. See Action Memorandum from H. Allen Holmes to the Secretary of State (Feb. 4, 1988) (declassified Aug. 10, 1989).

142. U.N. Doc. A/CONF. 62/92 (October 1, 1979). In announcing the program, President Carter commented that "[d]ue to its preeminent position, the United States feels compelled actively to protect its rights from unlawful encroachment by coastal states." John Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How Innocent Must Innocent Passage Be?*, 135 MIL. L. REV. 137, 147 (1992).

143. Richardson, *Power, Mobility and the Law of the Sea*, *supra* note 141, at 903.

144. Department of State Memorandum (Feb. 9, 1983) (declassified Oct. 6, 1992).

145. *Id.*

2. Continental territorial sea baseline claims that are not drawn in conformance with the [1982] LOS Convention.
3. Territorial seas claims exceeding three miles but not exceeding twelve miles in breadth that contain special requirements for entry or overlap straits used for international navigation.
4. Territorial seas claims in excess of twelve miles.
5. Other claims to jurisdiction over maritime areas in excess of twelve miles, such as exclusive economic zones or security zones, which purport to restrict non-resource related high seas freedoms.
6. Archipelagic claims that are not in conformance with the LOS Convention.¹⁴⁶

While the United States claimed that the navigational provisions in the Convention codified customary international law, a number of states challenged this assertion.¹⁴⁷ The Group of 77 argued that the navigational provisions of the Convention did not codify customary international law but rather created new international law.¹⁴⁸ Therefore, only signatories to the Convention could benefit from its provisions.¹⁴⁹ Similarly, Ambassador Tommy Koh, the second President of UNCLOS III, argued that the Convention did not codify customary law or reflect existing international practice.¹⁵⁰ In response, Reagan Administration officials noted that "[t]he convention does not so much create positive law in the nonseabed areas as simply incorporate existing law that will continue to be applicable to all states, not because of the treaty but because of the customary law underlying the treaty."¹⁵¹ Indeed, "the United States maintains that there exists an

146. National Security Decision Directive No. 72, *supra* note 63, at 1-2.

147. SCHMIDT, *supra* note 103, at 264-74. See generally David Larson, *Conventional, Customary and Consensual Law in the United Nations Convention on the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 75 (1994); MOSCOW SYMPOSIUM ON THE LAW OF THE SEA 19-30 (Thomas Clingan, Jr. & Anatoly L. Kolodkin eds., 1983); THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY: OPPORTUNITIES AND COSTS (Lawrence Juda ed., 1983).

148. The Group of 77 consisted of approximately 120 developing countries. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, *supra* note 135, at 81-82.

149. U.N. Press Release SEA/MB/14 (Dec. 10, 1982); G.A. Res. 59, U.N. GAOR, 38th Sess., Supp. No. 47, at 48, U.N. Doc. No. A/38/59 (1983). See generally Luke Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541 (1983).

150. Tommy Koh, *A Constitution for the Oceans*, in UNITED NATIONS, THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX xxxiv-xxxv (1983).

151. Malone, *supra* note 68, at 60. In 1986, the International Court of Justice noted in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, that portions of the 1982 LOS Convention "codify customary international law." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 111 (June 27).

international law of the sea totally independent of the Law of the Sea Convention."¹⁵² Another argument held that the 1982 LOS Convention represented "an indivisible package of interrelated compromises in which third states cannot generally find support for the exercise of customary rights."¹⁵³ The Reagan Administration responded that the package theory lacked legal foundation and that "[a]bsent a peremptory norm to the contrary, customary rights of sovereign states remain inviolate and cannot otherwise be denied."¹⁵⁴

The importance of the Freedom of Navigation program was reiterated by U.S. government officials throughout the Reagan Administration.¹⁵⁵ For example, Secretary of State George Shultz remarked that the State Department places a high priority on thoroughly articulated and timely expressions of U.S. policy regarding excessive maritime claims: "We shall, therefore, continue to protest such claims, laying particular emphasis on impermissible declarations made in con-

152. Malone, *supra* note 68, at 61. For these reasons, Secretary Malone noted that it is incorrect "to argue that only parties to the LOS Convention enjoy customary international legal rights of longstanding status." U.S. DEP'T OF STATE, FREEDOM AND OPPORTUNITY, *supra* note 68, at 2-3. Similarly, in testimony before the Senate Subcommittee on Arms Control, Oceans, International Operations and Environment, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs Theodore Kronmiller stated that "[t]he exercise by the United States of rights and freedoms under international law can be limited only with our consent. This point holds true with regard both to our right to mine the seabed and to our right to navigate under, on and over the world's oceans, including international straits." *Law of the Sea Negotiations: Hearings Before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 8 (1982).

153. Hugo Caminos & Michael Molitor, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 885 (1985). As Ambassador Tommy Koh noted at the conclusion of the signature session at UNCLOS III:

The second theme which emerged from the statements is that the provisions of the Convention are closely interrelated and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations.

Although the Convention consists of a series of compromises, they form an integral whole. This is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and disregard what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is therefore legally impermissible to claim rights under the Convention without being willing to assume the correlative duties.

Koh, *supra* note 150, at xxxiv-xxxvi.

154. U.S. DEP'T OF STATE, FREEDOM AND OPPORTUNITY, *supra* note 68, at 3. See also Bruce Harlow, *Correspondence*, 79 AM. J. INT'L L. 1037 (1985).

155. See also U.S. DEP'T OF STATE, FREEDOM AND OPPORTUNITY, *supra* note 68, *passim*; U.S. DEP'T OF STATE, CURRENT DEVELOPMENTS, *supra* note 73, *passim*.

junction with ratification of that Convention, unacceptable declarations made upon signing of it, and other excessive claims that significantly impair our maritime mobility."¹⁵⁶ Similarly, Assistant Secretary of State John Negroponte argued that:

The exercise of rights—the freedom to navigate on the world's oceans—is not meant to be a provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more. If the United States and other maritime states do not assert international rights in the face of claims by others that do not conform with the present status of the law, they will be said to acquiesce in those claims to their disadvantage. What is particularly difficult in this situation is to understand that the more aggressive and unreasonable and provocative and threatening a claim may be, the more important it is to exercise one's rights in the face of the claim. The world community can't allow itself to be coerced—coerced into lethargy in the protection of the freedom of the seas.¹⁵⁷

Since its formation in 1979, the FON program has been an integral part of U.S. maritime policy. Indeed, the Defense Department noted that once the 1982 LOS Convention enters into force, "the U.S. should continue to protest excessive maritime claims, and exercise routinely and on a global scale, U.S. navigational, overflight, and other defense-related rights and duties."¹⁵⁸

C. *Freedom of Navigation Challenges*

The Freedom of Navigation program combines diplomatic and operational challenges to contest objectionable claims.¹⁵⁹ The Departments of State and Defense are jointly responsible for the program and operations are conducted pursuant to careful interagency

156. Correspondence from Secretary of State George Shultz to Secretary of Defense Caspar Weinberger (Apr. 8, 1985) (declassified Nov. 20, 1989) (on file with author).

157. John D. Negroponte, Address before the Law of the Sea Institute (July 21, 1986), in BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 855, WHO WILL PROTECT FREEDOM OF THE SEAS? 3 (1986).

158. U.S. DEP'T OF DEFENSE, OCEAN POLICY REVIEW, *supra* note 22, at 19.

159. U.S. DEP'T OF STATE, GIST: U.S. FREEDOM OF NAVIGATION PROGRAM, *supra* note 21, *passim*; Galdorisi, *supra* note 22, at 79-80; Rolph, *supra* note 142, at 146-52. According to National Security Decision Directive Number 265, "[w]here possible, we should strive for a balanced challenge program which contests the excessive claims or illegal regimes of allied or friendly states, inimical powers, and neutral states alike. [In addition], [s]pecial emphasis should also be given to challenging claims which have no record of prior challenge." National Security Decision Directive No. 265 at 4 (Mar. 16, 1987) (declassified Aug. 10, 1992).

review. According to the State Department, "[t]he program was developed with the understanding that transits would become routine. Although diplomatic protests can be anticipated from some countries not adhering to the LOS Convention, reactions are not expected to be significant."¹⁶⁰

1. *Diplomatic Protests*

Under the FON program, the United States undertakes diplomatic action at several levels to preserve its rights under international law. It conducts bilateral consultations with many coastal states, stressing the need for all states to adhere to the rules and practices reflected in the 1982 LOS Convention.¹⁶¹ When appropriate, the State Department files a formal diplomatic protest addressing specific maritime claims.¹⁶² Since the FON program was established in 1979, the United States has presented diplomatic protests to more than 110 excessive maritime claims.¹⁶³ In addition, the FON program involves extensive multilateral efforts designed to maximize and affirm U.S. navigational rights.

In 1989, the Department of State initiated a formal review of the Freedom of Navigation program.¹⁶⁴ The review determined that various gaps existed in the implementation of the program. Specifically, it revealed that formal written objections had not been presented to approximately thirty excessive claims.¹⁶⁵ Thereafter, the State Department notified American embassies around the world that they must present official objections to excessive maritime claims. The following excerpt, taken from a telegram sent by the State Department to the American Embassy in Bucharest, Romania, is characteristic of the purpose of these notices:

USG [United States Government] believes that GOR's [Government of Romania's] claim exceeds the limits of international law of

160. Department of State Memorandum (Apr. 21, 1986) (declassified Oct. 6, 1992).

161. U.S. DEP'T OF STATE, LIMITS IN THE SEAS, *supra* note 20, at 1.

162. These diplomatic protests include formal notes, *notes verbale*, and *aides memoire*. ROACH & SMITH, *supra* note 20, at 4.

163. U.S. DEP'T OF STATE, LIMITS IN THE SEAS, *supra* note 20, at 1.

164. The study identified twenty states that claim a territorial sea in excess of twelve nautical miles, seventeen states that claim the right to establish some type of security zone beyond the territorial sea affecting the high seas freedoms of navigation and overflight, thirty-one states that claim excessive baselines, and five states that claim a right to require prior notice or permission for the innocent passage of nuclear powered warships. U.S. DEP'T OF STATE, LIMITS IN THE SEA, *supra* note 20, *passim*.

165. *Id.*

the sea. To avoid acquiescence and to influence international law of the sea development along acceptable lines, we object to such claims. This should not be viewed as a singling out of the GOR for criticism; post [the American Embassy] may assure GOR that such action is part of a current global review of excessive maritime claims and comports with longstanding USG practice of formally protesting them.¹⁶⁶

The following section reviews two diplomatic protests that were filed by the United States in 1989 against Finland and Haiti.¹⁶⁷ They exemplify the manner in which the United States responds diplomatically under the FON program.

a. Finland

On June 2, 1989, the American Embassy in Helsinki, Finland was ordered to deliver a note protesting Finland's decree of January 1, 1981, which established certain restrictions on the exercise of innocent passage by warships and non-commercial government ships entering Finnish territorial waters.¹⁶⁸ In particular, the United States protested: (1) the assertion that warships and non-commercial government vessels must notify Finland prior to transiting its territorial sea; (2) the prohibition of innocent passage through fortified areas or other declared areas of the Finnish territorial sea to be of military importance; (3) the prohibition of the arrival in such areas except between sunrise and sunset; and (4) the requirement to use pilot service and public sea lanes as regulated when navigating in Finnish territorial waters.¹⁶⁹

First, the U.S. protest note stated that under customary international law, as codified by the 1982 LOS Convention, the right of innocent passage through the territorial sea may be exercised by all ships, regardless of type or cargo, and may not be subject to a requirement of prior notification to the coastal state.¹⁷⁰ According to the protest note, the United States viewed the right of innocent passage as one of

166. Telegram from the Secretary of State, Washington D.C. to American Embassy, Bucharest, Romania (July 11, 1989) (declassified Dec. 4, 1989).

167. For a description of various U.S. diplomatic challenges, see ROACH & SMITH, *supra* note 20, *passim*.

168. Telegram from the Secretary of State, Washington D.C. to American Embassy, Helsinki, Finland (June 2, 1989) (declassified Dec. 4, 1989) [hereinafter Telegram from Secretary of State to Finland]. See also ROACH & SMITH, *supra* note 20, at 147-48.

169. Telegram from Secretary of State to Finland, *supra* note 168, at 66-67 (2-3).

170. *Id.* at 66.

the most fundamental maritime rights.¹⁷¹ Thus, U.S. government policy is to neither recognize nor respect in practice any nation's claim that vessels of any type must obtain permission, or provide prior notification, in order to conduct innocent passage through a territorial sea.

Second, the United States argued that Finnish claims to a right to deny innocent passage through fortified areas or other areas declared to be of military importance, as well as claims to limit arrival of government vessels in such areas only to the time between sunrise and sunset, were contrary to provisions in the 1982 LOS Convention.¹⁷² The United States asserted that the generally recognized provisions for temporary suspension of innocent passage set out in the 1982 LOS Convention adequately protected Finnish national security interests.¹⁷³

Third, the United States sought assurances that the provisions regarding public sea lanes in the Finnish territorial sea applied only to those sea lanes established as necessary for the safety of navigation.¹⁷⁴ According to the protest note, customary international law, as reflected in article 22 of the 1982 LOS Convention, permits a coastal state to establish sea lanes in its territorial sea where needed for the safety of navigation, after taking into account the recommendations of the competent international organization (*i.e.*, the International Maritime Organization), any channels customarily used for international navigation, the special characteristics of particular ships and channels, and the density of the traffic.¹⁷⁵ Evidently, the United States wanted to ascertain the rationale and purpose of the Finnish sea lane restrictions.

Finally, the United States argued that no authority exists in international law requiring compulsory pilotage of vessels engaged in innocent passage through the territorial sea.¹⁷⁶ While the United States had no objection to Finland offering pilotage services to U.S. warships and other government ships, the United States maintained that such services could be accepted or declined at the discretion of the flag state.¹⁷⁷

171. *Id.* at 68.

172. *Id.* at 69. For a discussion of maritime security zones, see Frederick Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 VA. J. INT'L L. 967 (1984).

173. Telegram from Secretary of State to Finland, *supra* note 168, at 66.

174. *Id.* at 67.

175. *Id.* at 70.

176. *Id.* at 69.

177. *Id.*

In response, the Finnish government stated that "[a]ccording to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 to which Finland is a party, it is within the sovereign right of a state to regulate internally the exercise of innocent passage of warships."¹⁷⁸ Thus, Finland would continue to apply its regime on innocent passage. It added, however, that the regime would be reconsidered if changes "emerge in the international regime on innocent passage in the territorial sea."¹⁷⁹

b. Haiti

On July 20, 1989, the American Embassy in Port Au Prince, Haiti was ordered to deliver a note protesting Haiti's decisions: (1) to prohibit the entry into its territorial sea and exclusive economic zone of any vessel transporting hazardous waste; and (2) to declare jurisdiction in its contiguous zone for the protection of its security.¹⁸⁰

First, the United States protested Haiti's *note verbale*—sent in the names of the Ministry of the Interior, Decentralization, and the General Police Force and the Civil Service and communicated to the United Nations by a letter dated February 29, 1988—which sought to prohibit entry into the territorial sea or the exclusive economic zone of Haiti, as well as into Haitian ports, of any vessel transporting waste, refuse, residues, or any other materials likely to endanger the health of the country's population and to pollute the marine, air, and land environment.¹⁸¹ The U.S. protest note stated that the 1982 LOS Convention did not recognize the right of a coastal state to prohibit the passage of ships transporting hazardous waste through a coastal state's territorial sea or exclusive economic zone.¹⁸² The United States main-

178. Telegram from the Secretary of State, Washington D.C. to American Embassy, Helsinki, Finland (July 14, 1989).

179. *Id.*

180. Telegram from Department of State, Washington D.C., to American Embassy, Port Au Prince, Haiti (June 18, 1989) (declassified June 5, 1990) [hereinafter Telegram from Department of State to Haiti]. This communication noted that the Haitian regulations exceeded the limits of international law.

To avoid acquiescence and to influence development of international law of the sea along acceptable lines, we object to such claims. This should not be viewed as singling out the GOH [Government of Haiti] for criticism; [the diplomatic] post may assure GOH that such action is part of a current global review of excessive maritime claims and comports with longstanding USG [United States Government] practice of formally protesting them.

Id.

181. *Id.* at 9.

182. *Id.* at 2.

tained that while customary international law affords coastal states the right to enact laws and regulations in the interest of preserving the environment, that legislation had to conform to the 1982 LOS Convention.¹⁸³ The note added that the United States was prepared to accept the right of the coastal state to monitor the transit of hazardous materials through its internal waters.¹⁸⁴ However, the United States would not accept any limitations on the freedom of navigation through the territorial sea.¹⁸⁵

The United States also protested Haiti's decree on June 12, 1977, which sought to assert jurisdiction in the contiguous zone for the protection of its security.¹⁸⁶ The protest note stated that customary international law, as reflected in the 1982 LOS Convention, did not recognize the right of coastal states to assert jurisdiction for security purposes in peacetime that would restrict the exercise of the high seas freedoms of navigation and overflight beyond the territorial sea.¹⁸⁷ According to article 33 of the LOS Convention, a coastal state is permitted to exercise, in a zone contiguous to its territorial sea, the control necessary to prevent the infringement only of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.¹⁸⁸ However, international law does not recognize the right of coastal states to assert powers or rights for security reasons beyond these purposes. Accordingly, the U.S. did not accept the peacetime validity of any claimed security zone seaward of the territorial sea, including an area contiguous to the territorial sea.

183. *Id.* at 4. At the same time, the United States expressed support for efforts to create an environmentally sound regime for the transboundary movement of hazardous waste. *Id.* Thus, the United States strongly supported the recently concluded Basel Convention on the Transboundary Movement of Hazardous Wastes, which Haiti had already signed, and which the United States was then reviewing. *Id.*

The Basel Convention includes a notice and consent regime for the transit of hazardous waste through a party's land territory and internal waters. Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/IG.80/3 (1989), reprinted in 28 I.L.M. 657 (1989) [hereinafter *Basel Convention*]. However, a savings clause, article 4(12), was included for the express purpose of precluding the argument that the Basel Convention parties consented to a regime that would permit the imposition of a notice and consent regime for the transit of hazardous waste through a coastal state's territorial sea and exclusive economic zone.

184. Telegram from Department of State to Haiti, *supra* note 180, at 4.

185. *Id.* at 4-5.

186. *Id.* at 5.

187. *Id.*

188. LOS Convention, *supra* note 50, art. 33. See also Rose Varghese, *Territorial Sea and Contiguous Zone: Concept and Development*, 9 COCHIN U. L. REV. 436 (1985).

Finally, the United States reasserted its protest of Haiti's drawing of excessive straight baselines along its coast and the drawing of a closing line across the Gulf of Gonave, thereby claiming the Gulf as internal waters of Haiti.¹⁸⁹ The U.S. argued that straight baselines are only permitted in exceptional circumstances. Under the 1982 LOS Convention, a specific formula exists for determining the closing line across the mouth of a bay or gulf. Since the Gulf of Gonave did not meet these criteria, it could not be considered internal waters.

2. Operational Protests

In conjunction with diplomatic action, the Defense Department conducts operational challenges to protest objectionable claims. According to the State Department, operational assertions tangibly manifest the U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other countries.¹⁹⁰ Operational challenges are conducted under strict regulation, and peacetime rules of engagement are applicable throughout FON operations. Naval and air units must follow strict guidelines if they are challenged during FON operations.¹⁹¹ In particularly sensitive challenges, approval must be re-

189. Telegram from Department of State to Haiti, *supra* note 189, at 7. The United States has operationally protested Haiti's drawing of excessive straight baselines for several years. For example, Freedom of Navigation challenges were conducted by the U.S.S. *Yosemite* on February 15, 1986, the U.S.S. *W.V. Pratt* on March 16, 1986, and the U.S.S. *Manitowac* on May 10, 1987. Naval Messages, Dep't of Navy, Messages from CINCLANTFLT (Apr. 1, 1986 & Oct. 27, 1987) (declassified June 30, 1989).

190. U.S. DEP'T OF STATE, LIMITS IN THE SEAS, *supra* note 20, at 1.

191. For example, the following message was sent by CINCUSNAVEUR to the Commander of the Sixth Fleet in preparation for a series of Freedom of Navigation challenges in 1985:

1. This message provides guidance for ships and aircraft challenging excessive maritime claims under the navigation and overflight program
2. Should U.S. ships and aircraft be questioned concerning their intention or justification for their actions during such operations, [the] following responses should be made:
 - A. Territorial sea greater than 12 nm [nautical miles] (Challenge beyond 12 nm):
 1. Ships: "I am operating in international waters."
 2. Aircraft: "I am operating in international airspace above the high seas."
 - B. Territorial sea greater than 12 nm (Challenge between 3 nm and 12 nm):
 1. Ships: "I am engaging in innocent passage."
 2. Aircraft: Not applicable.
 - C. Territorial sea between 3 nm and 12 nm with warship notification/authorization regime:
 1. Ships: "I am engaged in innocent passage." If challenging unit responds that prior permission not obtained for innocent passage ships

ceived from the Joint Chiefs of Staff or the President.¹⁹² Since 1945, the U.S. has operationally protested the objectionable claims of over forty states at the rate of approximately thirty to forty per year.¹⁹³

For obvious reasons, operational challenges create the potential for violent conflicts.¹⁹⁴ Since its foundation in 1979, FON exercises have resulted in numerous military confrontations between U.S. forces and foreign naval and air units. For example:

- In August 1979, Soviet aircraft staged more than 30 mock missile attacks against the destroyers U.S.S. *Caron* and U.S.S. *Farragut* as they conducted Freedom of Navigation exercises in the Black Sea. According to Pentagon officials, the Soviets sent out a variety of aircraft, including the Backfire bomber, to join reconnaissance planes in tracking the U.S. destroyers after they sailed into the Black Sea.¹⁹⁵
- On August 19, 1981, two Libyan SU-22 fighters attacked two U.S. F-14s during a previously announced U.S. naval maneuver and missile exercise conducted by elements of the Sixth Fleet operating within the Gulf of Sidra and approximately 60 nautical miles from the Libyan coast.¹⁹⁶
- On February 18, 1984, the destroyer U.S.S. *David Ray* was conducting FON operations in the Black Sea near Novorossiysk, U.S.S.R., when Soviet aircraft fired cannon rounds into the ship's wake and a Soviet helicopter swooped within 30 feet of the deck

should respond "International law permits all ships of all nations to exercise innocent passage without prior notification or authorization."

- D. Security Zones: Same response as for territorial sea depending on whether challenging unit is inside or outside 12 nm.
- E. Airspace claim greater than territorial sea claim:
 1. Ships: Not applicable
 2. Aircraft: "I am operating aircraft in international airspace above the high seas."

Message from Commander United States Naval Forces, Europe to Commander Sixth Fleet (Mar. 12, 1986) (declassified Aug. 7, 1989).

192. Defense Department Briefing Regarding Collision in Black Sea, Feb. 12, 1988, at 2 (on file with author).

193. ROACH & SMITH, *supra* note 20, at 4.

194. "Within DOD [Department of Defense], there is also a sober appreciation that the literal testing of the waters required by a FON strategy involves the risk of confrontation and escalation." William Arkin, *Spying in the Black Sea*, BULL. OF THE ATOMIC SCIENTIST, May 1, 1988, at 5.

195. *U.S. Ships Report Soviet Mock Attack*, L.A. TIMES, Aug. 11, 1979, at A5.

196. Commander Dennis Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, 108 NAVAL INST. PROC. 26-31 (1982). See generally Steven Ratner, *The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 YALE J. INT'L L. 59 (1984); John Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT'L L. 65 (1983).

while taking photographs of the destroyer. According to U.S. officials, the Soviet action was considered "a violation of the spirit of the Incidents at Sea Agreement."¹⁹⁷

- On March 26, 1986, during Freedom of Navigation exercises in the Gulf of Sidra, Libyan missile installations fired on aircraft providing combat air patrol. In response, aircraft from the U.S.S. *America* and the U.S.S. *Saratoga* attacked and destroyed several Libyan patrol boats and disabled the SA-5 Square Pair radar at Surt.¹⁹⁸

- On March 16, 1987, the U.S.S. *Arkansas*, a nuclear-powered guided missile cruiser, entered Avacha Bay on the Kamchatka Peninsula and approached Petropavlovsk, a sensitive Soviet submarine port and naval base. At the time, the *Arkansas* was conducting Freedom of Navigation (FON) operations. The approach of the *Arkansas* resulted in an immediate Soviet response.¹⁹⁹

Despite its propensity for conflict, the Freedom of Navigation program has led to the successful resolution of several maritime conflicts. Indeed, FON operations against the Soviet Union are perhaps the most successful example of the effectiveness of the Freedom of Navigation program.²⁰⁰

a. The Black Sea

For many years, the United States and the Soviet Union heavily disputed the right of U.S. warships to enter and conduct naval operations in the Black Sea.²⁰¹ According to the Pentagon, the United States has conducted maritime operations in the Black Sea since 1960, and by the 1980s, American warships were passing through the Turkish straits from the Mediterranean into the Black Sea two or three

197. Rick Atkinson, *High Seas Diplomacy Continuing*, WASH. POST, July 27, 1984, at A1.

198. Lieutenant Commander Robert Stumpf, *Air War with Libya*, 116 NAVAL INST. PROC. 42-48 (1986). See also Roger Haerr, *The Gulf of Sidra*, 24 SAN DIEGO L. REV. 751 (1987).

199. Document received from Commander Third Fleet (declassified June 27, 1989) (on file with author); Jeff Berliner, *Soviets, U.S. Navy Ship in Tense Confrontation*, UPI, Aug. 16, 1987.

200. Aceves, *supra* note 20, at 59.

201. See generally William Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331 (1987); Horace Robertson, *International Straits*, 20 VA. J. INT'L L. 4 (1980); Rolph, *supra* note 142, *passim*; William Schachte, Jr. and J. Peter Bernhardt, *International Straits and Navigational Freedoms*, 33 VA. J. INT'L L. 527 (1993).

times a year to "show the flag" and to exercise the right of innocent passage in the territorial seas of littoral states.²⁰²

The presence of U.S. warships in the Black Sea served three purposes. First, the United States sent warships through the Turkish straits to uphold its rights under the 1936 Montreux Convention.²⁰³ According to a U.S. government official, "[t]he Dardanelles and the Bosphorus form an international waterway. Passage is covered by the 1936 Montreux Convention. If you don't periodically reaffirm your rights you find that they're hard to revive."²⁰⁴ Second, U.S. operations in the Black Sea demonstrated that the waters outside the territorial sea are international waters, where every state enjoys the high seas freedoms of navigation and overflight. Third, the U.S. conducted Freedom of Navigation exercises in Soviet territorial waters in the Black Sea to affirm the right of innocent passage.

The Soviet Union considered the U.S. operations in the Black Sea unacceptable.²⁰⁵ Thus, the Soviets routinely dispatched naval vessels and aircraft to monitor U.S. warships. Specifically, the Soviets criticized the U.S. operations on three grounds. First, the Soviets claimed that the American maneuvers violated the Montreux Convention because the antisubmarine rocket (ASROC) caliber of the U.S. destroyers exceeded the 203 mm. Convention limit.²⁰⁶ Second, the Soviets criticized the maneuvers as both provocative and dangerous

202. Message from the Office of Information, Department of the Navy to the Commander in Chief, Naval Forces, Europe (Mar. 19, 1986). The United States has also conducted Freedom of Navigation operations in the Black Sea against Romania and Bulgaria. U.S. DEP'T OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH, SPOT INTELLIGENCE REPORT, BLACK SEA: SOVIETS SHOULD U.S. SHIPS IN SOVIET TERRITORIAL WATERS OFF COAST OF CRIMEA, Feb. 12, 1988, at 2.

203. The Montreux Convention was signed in 1936 and concerns the regulation of transit through the Turkish straits of the Bosphorus and Dardanelles. NATOALINO RONZITTI, *THE LAW OF NAVAL WARFARE* 435-82 (1988). The Montreux Convention granted exclusive Turkish sovereignty over the straits. It granted complete freedom of transit and navigation to merchant vessels. *Id.* However, the Convention significantly restricted transit by warships. *Id.* See generally Gerald Fitzmaurice, Note, *The Straits Convention of Montreux, 1936*, 18 BRIT. Y.B. INT'L L. 186 (1937).

204. Benjamin Welles, *While Keeping the Flag Flying*, N.Y. TIMES, Dec. 15, 1968, at 3E.

205. According to Igor Belyayev of *Pravda*, "[t]he waters of the Black Sea are joined with the Mediterranean through the Bosphorus and Dardanelles. The striving of the Soviet Union to protect its vital state interests in the region is completely natural and lawful." Igor Belyayev, *International Review*, PRAVDA, Dec. 7, 1968. Thus, the Soviets dispatched their naval vessels and aircraft in order to shadow and harass U.S. ships from the time they enter the Black Sea until they depart. *Id.*; Commander Richard Ackley, *The Soviet Navy's Role in Foreign Policy*, 2 NAVAL WAR C. REV. 48, 55 (1972).

206. Ackley, *supra* note 205, at 55-56. According to the United States, the ASROC is not a gun, and is thereby not covered by the Convention. *Id.*

and asserted that there was no justification for the maintenance by the United States of a presence in the Black Sea.²⁰⁷ In 1968, *Izvestiya* commentator A. Sharifov noted that "[t]he provocative visit by American ships to the Black Sea is aimed at troubling the clear waters of the good neighbor relations of the Black Sea countries."²⁰⁸ In the 1980s, the Soviets criticized Freedom of Navigation exercises in the Black Sea as an attempt to undermine improving Soviet-American relations.²⁰⁹ Third, the Soviet Union protested U.S. operations in Soviet territorial waters because they violated Soviet maritime regulations.²¹⁰ In 1983, the Soviet Union enacted the Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the U.S.S.R.²¹¹ The Rules limited the operation of foreign warships through the territorial waters of the Soviet Union. Specifically, the Soviet regulations stated that innocent passage through Soviet territorial waters was permitted only along routes ordinarily used for international navigation.²¹² The Rules set out "traffic separation schemes" through which warships could travel in the Baltic Sea, the Sea of Okhotsk, and the Sea of Japan.²¹³ There were no routes available for innocent passage in the Black Sea.²¹⁴

Freedom of Navigation operations in the Black Sea resulted in numerous confrontations between U.S. and Soviet forces.²¹⁵ Indeed, Soviet reaction to the U.S. presence in the Black Sea gradually developed from one of diplomatic protest to armed response. This conflict culminated in February 1988 when the U.S.S. *Yorktown* and *Caron* were struck by Soviet warships while conducting Freedom of Naviga-

207. *Id.* at 56.

208. A. Sharifov, *Provocateurs at Sea*, *IZVESTIYA*, Dec. 8, 1968.

209. Philip Taubman, *Soviet Says It Hopes "Provocation" by U.S. at Sea Won't Hurt Talks*, *N.Y. TIMES*, Feb. 14, 1988, at 19.

210. Joseph Darby, *The Soviet Doctrine of the Closed Sea*, 23 *SAN DIEGO L. REV.* 685 (1986).

211. The Rules were approved by the U.S.S.R. Council of Ministers on April 28, 1983. *Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the U.S.S.R.*, 28 *I.L.M.* 1715 (1985). See also Lieutenant Commander Ronald Neubauer, *The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union*, 1 *NAVAL WAR REV.* 49, 52 (1988).

212. *Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the U.S.S.R.*, *supra* note 211, 28 *I.L.M.* at 1715.

213. *Id.*

214. As noted by one Soviet commentator, "[i]n short, one may enter [through the traffic separation schemes] 'without knocking' there. In any other place, as not only good manners but also international norms suggest, one should knock first." Gorokhov, *What Business Do They Have Off Our Coast?*, *PRAVDA*, Feb. 14, 1988, at 4.

215. See generally Arkin, *supra* note 194, at 5.

tion operations in Soviet territorial waters south of the Crimean peninsula in the Black Sea.²¹⁶

Following the February 1988 incident, the Soviet Union expressed a strong desire to reach some form of accommodation with the United States on the issue of innocent passage in Soviet territorial waters.²¹⁷ Indeed, the State Department noted "that the Soviets entered into a serious effort to reconcile our divergent views of the right of innocent passage only after the February 1988 Black Sea FON operation."²¹⁸ Secretary of Defense Frank Carlucci suggested that the United States and the Soviet Union should try to set better guidelines for reducing dangerous incidents such as the confrontation in the Black Sea.²¹⁹

As a result, the United States and Soviet Union held a series of bilateral consultations in an attempt to resolve the issues raised by the bumping incident. The negotiations involved two distinct matters: (1) the avoidance of dangerous military activities; and (2) the right of innocent passage. This dialogue resulted in the signing of two bilateral agreements in 1989: the Agreement on the Prevention of Dangerous Military Activities and the Uniform Interpretation of Rules of International Law Governing Innocent Passage.

On June 1, 1989, the Agreement on the Prevention of Dangerous Military Activities (Agreement) was signed in Moscow by Admiral Crowe and Colonel General Mikhail Moiseyev, newly appointed Chief of the Soviet General Staff.²²⁰ According to the Agreement, the parties were "guided by generally recognized principles and rules of international law."²²¹ The document notes that both sides are convinced of the need to prevent dangerous military activities and thereby reduce the possibility of incidents arising between their armed forces.²²² The Agreement states that the parties "shall exercise great

216. Aceves, *supra* note 20, *passim*. See generally John Hitt, *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 VA. J. INT'L L. 713 (1989); William Schachte, *The Black Sea Challenge*, 114 NAVAL INST. PROC. 62 (1988).

217. Action Memorandum to the Secretary of State (Sept. 5, 1989) (declassified June 5, 1990); Memorandum from Secretary of State to American Embassy, Moscow (Aug. 8, 1988) (declassified June 5, 1990).

218. Memorandum from Secretary of State to American Embassy, Moscow, *supra* note 217.

219. Charles Aldinger, *No Change in Soviet Military Policy*, Reuters, Mar. 15, 1988.

220. Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, June 1, 1989, *reprinted in* 28 I.L.M. 877 (1989).

221. *Id.* at 879.

222. *Id.*

caution and prudence while operating near the national territory of the other Party.”²²³ It allows the parties to designate “Special Caution Areas” where military personnel must establish and maintain communications and undertake measures to prevent dangerous military activities.²²⁴ The Agreement also provides for the establishment of a Joint Military Commission to ensure compliance with the Agreement and consider ways to ensure a higher level of safety.²²⁵

On September 23, 1989, Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze signed the Uniform Interpretation of Rules of International Law Governing Innocent Passage (Uniform Interpretation).²²⁶ The Uniform Interpretation provides a common understanding between the parties concerning the right of innocent passage as codified in the 1982 LOS Convention. First, it acknowledges that “[t]he relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea.”²²⁷ It then provides that “[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.”²²⁸ The Uniform Interpretation recognizes that the coastal state may prescribe sea lanes and traffic separation schemes only where necessary to protect the safety of navigation.²²⁹ Finally, the Uniform Interpretation notes that “[w]ithout prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.”²³⁰

On September 28, 1989, the State Department notified all U.S. diplomatic posts that since Soviet border regulations had been

223. *Id.* at 882.

224. *Id.* at 883.

225. *Id.*

226. Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, Sept. 23, 1989, U.S.-U.S.S.R., *reprinted in* 28 I.L.M. 1444 (1989) [hereinafter Uniform Interpretation].

227. *Id.* art. 1.

228. *Id.* art. 2. Article 3 of the Uniform Interpretation provides that “[a]rticle 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.” *Id.* art. 3.

229. *Id.* “In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.” *Id.*

230. *Id.* art. 8.

brought into conformity with the 1982 LOS Convention, the U.S. government had assured the Soviet Union that the United States had no reason to exercise its right of innocent passage under the Freedom of Navigation program in the Soviet territorial sea.²³¹ Accordingly, without prejudice to its right of innocent passage, the United States informed the Soviet Union that it did not intend to conduct further Freedom of Navigation challenges in Soviet territorial waters.²³² The State Department noted, however, that the warships of both countries retain the right to conduct innocent passage incidental to normal navigation in the territorial sea.²³³ Moreover, it added that the United States would continue to conduct routine operations in the Black Sea and that the U.S. retained its right to exercise innocent passage in any territorial sea in the world.²³⁴

IV. An Analysis of the Freedom of Navigation Program

The purpose of the Freedom of Navigation program is to exercise U.S. rights "in the face of excessive maritime claims in order to protect the international legal principles upon which [U.S.] navigation and overflight rights and freedoms are based."²³⁵ According to the Department of State:

231. Department of State CIRCTEL No. 311861 (Sept. 28, 1989).

232. Specifically, Secretary Baker delivered a letter to Foreign Minister Shevardnadze which noted that "without prejudice to its rights to exercise innocent passage, the United States of America has no intentions to conduct innocent passage with its warships in the territorial sea of the Union of the Soviet Socialist Republics in the Black Sea." *Id.* See also Rear Admiral Eugene Carroll, *Peace Comes to the Black Sea*, 18 ARMS CONTROL TODAY 22, 22 (July-Aug. 1990). In response, Soviet Foreign Minister Shevardnadze delivered a letter to Secretary Baker which provided:

The Union of Soviet Socialist Republics notes the signing of the Joint Interpretation by the Union of Soviet Socialist Republics and the United States of America on Uniform Interpretation of Rules of International Law Governing Innocent Passage as well as actions by the United States of America to implement the Joint Statement. The Union of Soviet Socialist Republics confirms that all differences which may arise between the Union of Soviet Socialist Republics and the United States of America regarding a particular case of passage of ships should be settled through diplomatic channels.

Letter sent from the Minister of Foreign Affairs of the U.S.S.R. to the Secretary of State of the U.S., in Memorandum from the Department of State Division of Language Services (Aug. 30, 1989) (declassified June 5, 1990).

233. Draft letter from Secretary of State Baker to Foreign Minister Shevardnadze, in Action Memorandum from Frederick Bernthal to Secretary of State (Sept. 5, 1989) (declassified June 5, 1990) [hereinafter Action Memorandum].

234. *Id.* at 1.

235. Telegram from the Department of State, Washington D.C. to CINCUSNAVEUR (Feb. 16, 1983) (declassified Oct. 8, 1992).

International law is made not just by documents, but by practice. When a country claims greater jurisdiction over the seas than that to which it is entitled under international law, it is appropriate to protest. Protests, however, are no guarantee that illegal maritime claims will not eventually acquire *de facto*, even *de jure*, status. That is why this country has a program of asserting in practice our navigational rights and freedoms under international law.²³⁶

In this respect, the FON program is the most recent manifestation of a basic principle of U.S. foreign policy that can be traced back over two-hundred years.

A. *The U.S. Rationale*

The FON program is based upon the two principal sources of public international law: (1) customary international law and (2) treaty law.²³⁷ This justification occurs on two levels. First, the United States has argued that the substantive nature of the FON program—freedom of navigation—is grounded in both customary international law and the 1982 LOS Convention.²³⁸ While the United States did not sign the 1982 LOS Convention until 1994, it has consistently argued that the provisions of the Convention governing navigation and other traditional uses codify customary international law.²³⁹ Consequently,

236. Department of State Memorandum (Apr. 26, 1988) (declassified Aug. 10, 1989).

237. Article 38 of the Statute of the International Court of Justice identifies four sources of international law: (1) international conventions; (2) international custom; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and the teachings of highly qualified publicists. I.C.J. Statute, art. 38 (1945), *reprinted in* INTERNATIONAL COURT OF JUSTICE, No. 5, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT 77 (1989). Customary international law and treaty law are considered the two principal sources of international law. As noted by Phillip Trimble, "customary international law consists of obligations inferred from the general practice of states—what is habitually done by most members of the international community out of a sense of legal obligation." Phillip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986). In contrast, "[t]reaty law consists of expressly accepted obligations spelled out in international agreements freely adhered to by states." *Id.* Both customary international law and treaty law are viewed as equally authoritative. *Id.* But see MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 34-36 (1985); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273 (1977).

238. For an analysis of the development of freedom of navigation, see generally FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA (1990); POTTER, *supra* note 3; R.P. Anand, *The Tyranny of the Freedom of the Seas Doctrine*, 12 INT'L STUD. 416 (1973); Ruth Lapidoth, *Freedom of Navigation: Its Legal History and Normative Basis*, 6 J. MAR. L. & COM. 259 (1974-75).

239. Brian Hoyle, *The Status of LOS Non-Seabed Provisions as Customary International Law: United States Government Perspective*, in THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY, *supra* note 147, at 133-37 ("Upon close examination, one would

the United States has asserted that the FON program is consistent with both customary international law and the 1982 LOS Convention.²⁴⁰

Second, the United States has argued that the legal nature of the FON program is grounded in both customary international law and treaty law. Specifically, the rules governing the development of customary international law and the existence of ambiguous provisions in the 1982 LOS Convention require that the United States conduct FON operations to assert its navigational rights and clarify ambiguous treaty provisions. The following section examines the legal basis for the FON program.

1. Customary International Law

According to international law, state practice that is continuous and long-standing may develop into customary international law and be considered legally binding on those states that have acquiesced in its formation and development.²⁴¹ Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) defines international custom as "evidence of a general practice accepted as law."²⁴² According to the *Restatement (Third) of the Foreign Relations Law of the United States*, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."²⁴³ In *The Scotia*, the U.S. Supreme Court described the development of customary international law with respect to the law of the sea in the following manner:

Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. . . . Many

find that prevailing State practice today is consistent with the LOS Convention and that most States would consider that State practice to be subject to a legal obligation to behave in that way."). See generally David Treat, *The United States' Claims of Customary Legal Rights Under the Law of the Sea Convention*, 41 WASH. & LEE L. REV. 253 (1984).

240. Bruce Harlow, *The Status of LOS Non-Seabed Provisions as Customary International Law: Defense*, in *THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY*, *supra* note 147, at 122-26.

241. See BRIERLY, *supra* note 6, at 59-62; BROWNLIE, *supra* note 5, at 4-11. See also Josef Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662 (1953).

242. I.C.J. Statute, art. 38(1)(b) (1945), *supra* note 237, at 77.

243. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

of the usages which prevail, and which have the force of law, doubtless originated in the positive prescription of some single state, which were at first of limited effect, but which when generally accepted become of universal obligation.²⁴⁴

On this same topic, Myres McDougal wrote that the international law of the sea is:

a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them.²⁴⁵

The basis of customary international law, therefore, is the notion that "states in and by their international practice may implicitly consent to the creation and application of international legal rules."²⁴⁶

The sources of customary international law are found in state practice.²⁴⁷ Sources of custom are numerous and may include diplomatic correspondence, policy statements, press releases, the opinions of legal advisers, official manuals on legal questions, executive decisions and practices, orders to naval forces, international and national judicial decisions, treaty provisions, and other international obligations.²⁴⁸ The *Restatement (Third)* notes that the practice of states "includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states."²⁴⁹

244. *The Scotia*, 81 U.S. (14 Wall.) 170, 187-88 (1871). See also *The Paquete Habana*, 175 U.S. 677, 686 (1900) ("By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.").

245. Myres McDougal, Editorial Comment, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-57 (1955).

246. MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 42 (2d ed. 1984).

247. MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 24 (1987). See generally William Burke, *Customary Law of the Sea: Advocacy or Disinterested Scholarship?*, 14 YALE J. INT'L L. 508 (1989); Louis Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U. L. REV. 271 (1985).

248. BROWNIE, *supra* note 5, at 5. The ICJ has noted that the form of the protest is not decisive and that "the sole relevant question is whether the language employed in any given declaration does reveal a clear intention." *Temple of Preah Vihear (Cambodia v. Thailand)*, 1961 I.C.J. 17, 32 (May 26).

249. RESTATEMENT (THIRD), *supra* note 243, § 102 cmt. b.

In addition to these traditional sources, omission and silence may be considered relevant in the development of customary international law. State inaction may imply ratification through acquiescence.²⁵⁰ The decisions of both the Permanent Court of International Justice (PCIJ) and the International Court of Justice suggest that the failure of a state to take certain action may be deemed relevant in determining the status of customary international law.²⁵¹

Some scholars and jurists have suggested that only physical acts can constitute state practice giving rise to the development of a customary norm of international law. Thus, diplomatic statements and other non-physical acts are insufficient to affect the development of customary international law. Anthony D'Amato has argued that "[w]hen a rule is alleged to be a rule of 'custom,' the person asserting the rule must adduce a qualitative articulation of the rule and a quantitative element as well."²⁵² Indeed, while diplomatic claims may articulate a legal norm, they cannot constitute the material component of custom. According to D'Amato "for a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do."²⁵³ In his *Anglo-Norwegian Fisheries* dissent, Judge Read of the ICJ stated that:

Customary international law . . . cannot be established by citing cases where coastal [s]tates have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over foreign ships The only convincing evidence of State prac-

250. VILLIGER, *supra* note 237, at 18-20; Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 10 (1977). See generally I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115 (1958).

251. In the *Lotus* case, the PCIJ examined whether Turkey could exercise criminal jurisdiction to prosecute a French citizen for acts committed on the high seas. Specifically, the Court looked to whether customary law authorized Turkey to exercise such jurisdiction. In its analysis, the Court indicated that state inaction could give rise to a customary norm of international law. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Oct. 12).

In the *Nottebohm* case, Liechtenstein sought to exercise its jurisdiction on behalf of a naturalized citizen against Guatemala before the International Court of Justice. *Nottebohm* (Liecht. v. Guat.), 1955 I.C.J. 4 (Apr. 6). Guatemala challenged the proceedings, arguing that there were insufficient contacts between Liechtenstein and the naturalized citizen that would authorize Liechtenstein's exercise of jurisdiction. *Id.* at 12. In its analysis, the Court examined state practice to determine whether Liechtenstein's assertion of jurisdiction was appropriate. *Id.* at 20-24. The Court held that Liechtenstein could not extend its protection to the citizen in this case. *Id.* at 26.

252. ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 87 (1971).

253. *Id.* at 88.

tice is to be found in seizures, where the coastal [s]tate asserts its sovereignty over trespassing ships.²⁵⁴

Consistency of state practice is essential for the development of customary international law.²⁵⁵ The emphasis on consistency is based on the notion that customary international law depends upon its regular observance in practice.²⁵⁶ In the *Asylum* case, the International Court of Justice examined the customary practice of granting diplomatic asylum.²⁵⁷ According to the ICJ, the party which relies on a custom must prove that it is established in such a manner that it has become binding on the other party and that the rule is in accordance with a constant and uniform usage practiced by the states in question.²⁵⁸ It refused to acknowledge that the alleged practice of granting diplomatic asylum had become a customary rule of international law

254. *Anglo-Norwegian Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 191 (Dec. 18) (dissenting opinion of Judge Read).

255. As noted by Ambassador Richardson in 1980, "the survival of any principle of customary international law depends upon the consistency of its observance in practice." Richardson, *Power, Mobility and the Law of the Sea*, *supra* note 141, at 969. He recognized, however, that the achievement of consistency does not come easily "in the face of constant pressures to give priority to the preservation of cordial bilateral relations." *Id.* Following the disclosure of the Freedom of Navigation program, Ambassador Richardson noted that numerous U.S. government officials had appealed to him "for the blurring or delay of activities of the kind referred to in the CINCLANT communication on such grounds as the 'adverse effect on other matters on which we are seeking their support,' 'jeopardy to important American economic interests,' 'repercussions on sensitive bilateral developments,' and the like." *Id.*

The importance of consistency was exemplified during an evaluation of proposed FON operations conducted from October 1982 through March 1983. In reviewing the proposed navigation and overflight program that was to be conducted in the Black Sea, Rear Admiral S.H. Packer, Acting Deputy Chief of Naval Operations, argued that in order to maintain a uniform policy, the United States should not challenge Bulgaria's excessive maritime claims unless it also challenged the Soviet Union's claims. Memorandum from Rear Admiral S.H. Packer to the Director, Joint Staff (Oct. 28, 1982) (declassified Jan. 17, 1991) (on file with author). According to Admiral Packer, the Navy firmly adhered to the view that a challenge to Bulgaria's warship notification regime without challenging the identical Soviet claim in the Black Sea would be counterproductive and undermine the appearance of U.S. resolve in the face of illegal claims. *Id.* Such passivity would suggest reluctance to challenge the illegal maritime arrogations of powerful adversaries, which in turn could well be construed as acquiescence to such claims. Admiral Packer noted that "although the Navy is committed to the proposition that eventually all excessive maritime claims must be challenged, no challenge can be either considered or executed in isolation from all pertinent political, military, geographic or juridical factors." *Id.* In this case, these factors substantially outweighed the benefit that might be gained by challenging Bulgaria's claims alone. *Id.*

256. The duration, frequency, uniformity and generality of a practice provide evidence of consistency. BROWNLEE, *supra* note 5, at 5-6.

257. *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Nov. 20).

258. *Id.* at 276-77.

since the facts disclosed so much fluctuation.²⁵⁹ According to the Court, "[t]he facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency . . . that it is not possible to discern in all this any constant and uniform usage, accepted as law."²⁶⁰

This analysis suggests that the development of customary international law may be successfully challenged by states who continuously object to its formation.²⁶¹ When the acts of some states encounter protests from other states, these acts and protests often cancel each other out.²⁶² The doctrine of protest is consistent with the positivist theory of international law—states can only be bound by their consent.²⁶³

Lassa Oppenheim defined protest as "a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter."²⁶⁴ A more elaborate definition was provided by I.C. MacGibbon:

[A] formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create, and that it has no intention of abandoning its own rights in the premises.²⁶⁵

Thus, a protest serves three purposes: it challenges the development of customary international law; it enables a state to escape from being

259. *Id.* at 277.

260. *Id.*

261. See VILLIGER, *supra* note 237, at 15-17. See generally Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985). But see D'AMATO, *supra* note 252. Anthony D'Amato has argued that the persistent objector rule only applies in the case of special custom. Whereas general customary law applies to all states, special custom applies to a limited group of states. Examples of special custom include nongeneralizable topics such as title to territorial areas or rules expressly limited to countries of a certain region. *Id.* at 233-62.

262. AKEHURST, *supra* note 247, at 39.

263. See generally FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 18-19 (1985); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 12-13 (1954); Roberto Ago, *Positivism*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 385 (1984); I.M. Lobo De Souza, *The Role of State Consent in the Customary Process*, 44 INT'L & COMP. L.Q. 521 (1995); Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313 (1908).

264. LASSA OPPENHEIM, *INTERNATIONAL LAW* 789 (7th ed. 1949).

265. I.C. MacGibbon, *Some Observations on the Part of Custom*, 30 BRIT. Y.B. INT'L L. 293, 298 (1954).

bound by the development of an emerging norm of international law; and it provides a state with the opportunity to promote the acceptance of its own viewpoints as to the proper status of the law.²⁶⁶ The International Court of Justice acknowledged the use of protest by a state to successfully challenge the development of customary international law in the *Anglo-Norwegian Fisheries* case where it held that a maritime delimitation rule on bays "would appear to be inapplicable as against Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast."²⁶⁷

The Freedom of Navigation program is used to challenge the development of customary international law and "to lower the expectation of coastal states that their illegal claims will be observed."²⁶⁸ In its 1993 Ocean Policy Review, the Department of Defense recognized that international law "derives from the practice of nations in the international arena."²⁶⁹ Thus, the FON program was necessary to "preserve fundamental freedoms of navigation and overflight."²⁷⁰

In addition, the FON program is used by the United States to promote acceptance of its own views on the law of the sea. In 1986, David Colson, then Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs at the State Department, noted that a state may not only wish to avoid being bound by developing international law that is contrary to its interests, but it may also hope to promote acceptance of its own viewpoint as to the proper interpretation of the law.²⁷¹ According to Mr. Colson, the Freedom of Navigation program promotes the U.S. view of international law.²⁷² Indeed, "[t]hese operations . . . are a clear statement of the national resolve to maintain navigational rights and freedoms and to mold customary international law into the desired form."²⁷³

The FON program is also based upon the assertion of rights doctrine which provides that a state may affirm a right which has been unjustly denied and is not bound to abstain from exercising its rights

266. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 433-34 (1983).

267. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18).

268. Message from the Department of State to CINCUSNAVEUR (Apr. 22, 1987) (declassified Oct. 8, 1992).

269. U.S. DEP'T OF DEFENSE, OCEAN POLICY REVIEW, *supra* note 22, at x.

270. *Id.* at 18.

271. David Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 968 (1986).

272. *See id.*

273. *Id.*

under international law.²⁷⁴ One of the earliest pronouncements of this doctrine was expressed by the International Court of Justice in the *Corfu Channel* case.²⁷⁵ In 1946, Albania sought to prohibit passage through the Corfu Channel, asserting that the Channel constituted Albanian territorial waters and that no vessel had a right to enter without prior notification and authorization.²⁷⁶ On May 15, Albanian shore batteries fired upon two British warships passing through the Channel.²⁷⁷ The United Kingdom immediately protested the attack, asserting that international law recognized the right of innocent passage for warships through the Channel.²⁷⁸ The British government warned that if Albanian coastal batteries opened fire on any British warship passing through the Strait, the warships would respond with force.²⁷⁹ On October 22, the British sent two warships to assert British navigational rights through the Channel.²⁸⁰ While steaming through the Channel, the warships were struck by mines and heavily damaged.²⁸¹ Three weeks later, the Channel was swept by a large force of British minesweepers. The minesweeping operation discovered and cut several mines.²⁸²

The United Kingdom presented a complaint against Albania to the U.N. Security Council which, after several months of investigation and debate, recommended that the dispute be submitted to the International Court of Justice.²⁸³ The ICJ was asked to examine whether the United Kingdom violated Albanian sovereignty when it sought to assert its navigational rights through the Channel.²⁸⁴ Two questions were submitted to the ICJ:

- (1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters

274. BRIERLY, *supra* note 6, at 427-30; MARJORIE WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 52-55 (1971); McDougal, *supra* note 245, at 156-57. *But see* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 256, 264-68 (1963); Arvid Pardo, *Commentary, in THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES* (Ryan Amacher & Richard Sweeney eds., 1983).

275. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9). *See generally* J.M. Jones, *The Corfu Channel Case: Merits*, 26 BRIT. Y.B. INT'L L. 447 (1949); Quincy Wright, *The Corfu Channel Case*, 43 AM. J. INT'L L. (1949).

276. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 12 (Apr. 9).

277. *Id.* at 27.

278. *Id.*

279. *Id.*

280. *Id.* at 28.

281. *Id.* at 12-13.

282. *Id.* at 13.

283. *Id.* at 5.

284. *Id.* at 6.

and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?²⁸⁵

(2) Has the United Kingdom under international law violated the sovereignty of the Albania People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?²⁸⁶

As to the first question, the ICJ held that "Albania is responsible under international law for the explosions which occurred . . . in Albanian waters, and for the damage and loss of human life that resulted therefrom."²⁸⁷ As to the second question, the ICJ held that "the United Kingdom did not violate the sovereignty of . . . Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946."²⁸⁸

The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.²⁸⁹

The Court's analysis suggests that if a state has a legal right under international law and another state wrongfully and forcibly persists in interfering with its exercise, the first state is not bound to submit to the lawless use of force by the second but may lawfully assert its right by the threat and use of force.²⁹⁰ The ICJ noted, however, that the acts of the British Navy in Albanian waters on November 12 and 13, 1946 "violated the sovereignty of . . . Albania and that this declaration by the Court constitutes in itself appropriate satisfaction."²⁹¹ The minesweeping operation "could not be justified as the exercise of a right of innocent passage and . . . international law does not allow a

285. *Id.*

286. *Id.*

287. *Id.* at 36.

288. *Id.*

289. *Id.* at 30. The ICJ concluded that the passage was innocent despite its purpose to assert navigational rights. *Id.* See Rolph, *supra* note 142, at 153-60.

290. BRIERLY, *supra* note 6, at 429; Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 27 BRIT. Y.B. INT'L L. 1, 27-31 (1954). See generally R.E. Ward, *The Right of Innocent Passage and the Legality of Reprisals*, 13 SAN DIEGO L. REV. 765 (1975).

291. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 36 (Apr. 9).

State to assemble a large number of warships in the territorial waters of another State and to carry out minesweeping in those waters."²⁹²

In summary, the importance of state practice in developing and affirming international rights suggests the need for operational conduct by states. Thus, the U.S. government has argued that customary international law provides a powerful justification for the Freedom of Navigation program.

2. *The 1982 LOS Convention*

Along with customary international law, international treaties are considered a principal source of international law.²⁹³ Treaties can both codify customary international law and create new sources of international law.²⁹⁴ While the United States did not sign the LOS Convention until 1994, it has consistently argued that the provisions of the Convention governing navigation and other traditional uses codify customary international law.²⁹⁵ In addition, the United States has indicated that it considers itself bound by the provisions of the Convention relating to traditional uses of the oceans, including navigational

292. *Id.* at 34.

293. Article 1(a) of the Vienna Convention on the Law of Treaties defines "treaty" as "an international agreement concluded between States in written form and governed by international law." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 1(a), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. According to Brownlie, a law-making treaty creates "legal obligations the observance of which does not dissolve the treaty obligation." BROWNIE, *supra* note 5, at 12. He adds that "[l]aw making treaties create general norms for future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties." *Id.*

294. The *Restatement (Third)* provides that "[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." RESTATEMENT (THIRD), *supra* note 243, § 102(3).

In addition, the ICJ noted in the *North Sea Continental Shelf* cases that customary international law and treaty law can codify identical rules. *North Sea Continental Shelf* (F.R.G. v. Den./Neth.), 1969 I.C.J. 4, 39 (Feb. 20). See generally HAROLD THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972); Richard Baxter, *Treaties and Custom*, 129 R.C.A.D.I. 25 (1970); Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-66); Jonathan Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986).

295. See generally Thomas Clingan, Jr., *Freedom of Navigation in a Post-UNCLOS III Environment*, 46 LAW & CONTEMP. PROBS. 107 (1983); Bruce Harlow, *Comment*, 46 LAW & CONTEMP. PROBS. 125 (1983).

rights.²⁹⁶ Thus, the United States views the 1982 LOS Convention as an important source of international law.²⁹⁷

Despite the extensive nature of the negotiations leading to the adoption of the 1982 LOS Convention, several ambiguous and indeterminate provisions remain in the English language text.²⁹⁸ In addition, a careful analysis reveals that conflicting interpretations exist among the six different language texts of the LOS Convention.²⁹⁹ These ambiguities are significant for they allow states to argue that their particular interpretations of the 1982 LOS Convention are valid.

The Vienna Convention on the Law of Treaties contains several provisions concerning the interpretation of treaties.³⁰⁰ Article 31(1) provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³⁰¹ Article 31(2) adds that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

296. *Hearings*, *supra* note 87, at 19.

297. For a description of customary international law in the context of the law of the sea, see Anatoly Kolodkin & Anatoly Zakharov, *The UN Convention on the Law of the Sea and Customary Law*, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA 166 (Jon Van Dyke ed., 1985); John King Gamble & Maria Frankowska, *The 1982 Convention and Customary Law of the Sea: Observations, a Framework, and a Warning*, 21 SAN DIEGO L. REV. 491 (1984); John King Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L.J. 305 (1981); Lawrence Howard, *The Third United Nations Conference on the Law of the Sea and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 321 (1981).

298. For a list of ambiguous provisions, see KEN BOOTH, LAW, FORCE, AND DIPLOMACY AT SEA 74-89 (1985). See also UNITED NATIONS, THE LAW OF THE SEA: PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1994) [hereinafter UNITED NATIONS, THE LAW OF THE SEA]. Charney, *supra* note 95, *passim*; Jonathan Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227 (1994) (describing the indeterminacy of the maritime delimitation provisions in the 1982 LOS Convention).

299. The 1982 LOS Convention was drafted in six authentic language texts: Arabic, Chinese, English, French, Russian, and Spanish. LOS Convention, *supra* note 50, art. 320. A State Department analysis of the 1982 LOS Convention identified language differences in several provisions of the Chinese, French, Russian, and Spanish texts of the Convention. Department of State Memorandum from David Small (Aug. 31, 1985) (declassified Aug. 10, 1989).

300. Vienna Convention, *supra* note 293.

301. *Id.* art. 31(1).

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.³⁰²

Article 31(3) provides that there shall be taken into account, together with the context of the treaty:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and

(c) any relevant rules of international law applicable in the relations between the parties.³⁰³

Article 32 provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion when application of the provisions of article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.³⁰⁴

Under the provisions of the Vienna Convention, therefore, state practice is considered relevant for the interpretation of treaty provisions. Indeed, the use of subsequent state practice to clarify treaty provisions is considered a customary rule of international law.³⁰⁵ Both the Permanent Court of International Justice and the International Court of Justice have consistently held that subsequent state practice maintains probative value as to the meaning and understanding of treaty provisions.³⁰⁶ For example, the PCIJ noted in the *Competence of the International Labour Organization With Respect to Agricultural Labour* case that if there was any ambiguity in the Treaty of Versailles, "the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty."³⁰⁷ The International Court of Justice alluded to the use of state practice in guiding treaty interpretation when it noted in the *Corfu Channel* case that "the subsequent attitude of the Parties shows it has not been their intention, by entering into the Special Agree-

302. *Id.* art. 31(2)(a)-(b).

303. *Id.* art. 31(3)(a)-(c).

304. *Id.* art. 32.

305. LORD MCNAIR, *THE LAW OF TREATIES* 424-31 (1961). See also Gerald McGinley, *Practice as a Guide to Treaty Interpretation*, *FLETCHER FORUM* 227 (Winter 1985).

306. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 136-37 (2d ed. 1984).

307. *Competence of the International Labour Organization With Respect to Agricultural Labour*, 1922 P.C.I.J. (ser. B) No. 2, at 39 (Aug. 12).

ment, to preclude the Court from fixing the amount of the compensation."³⁰⁸

For these reasons, the United States has used the Freedom of Navigation program to clarify ambiguous provisions and promote the acceptance of its own views on the 1982 LOS Convention. As early as 1983, Commander Dennis Neutze, then Legal Adviser to the Deputy Chief of Naval Operations, suggested that the clearest interpretation of the ambiguous language of the 1982 LOS Convention would be the "actual operational practices of those who base their navigational rights on its provisions."³⁰⁹ Through its operational practices, the United States should clearly demonstrate its understanding that the language of the Convention has no significant impact on naval mobility.³¹⁰ Such practices would help interpret the 1982 LOS Convention and shape the customary international law that would define the rights and duties of nonsignatories. Thus, Commander Neutze indicated that "[t]he United States must continue to operate its forces in a manner that ensures the treaty's language is properly interpreted and demonstrates to the world that the United States is firmly resolved to maintain its navigational freedoms."³¹¹

There have been several attempts by states to exploit ambiguities in the 1982 LOS Convention.³¹² Indeed, a recent study by the United Nations indicates that despite the extensive codification effort in the LOS Convention, the practice of several states diverges on certain issues, including the breadth of the territorial sea and the right of innocent passage for warships.³¹³

For example, a critical point of contention between the United States and the Soviet Union concerned the scope of article 22, paragraph 1 of the Convention: specifically, does the Convention allow

308. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 25 (Apr. 9).

309. Commander Dennis Neutze, *Whose Law of Whose Sea?*, 109 NAVAL INST. PROTOCOL 43, 48 (1983).

310. *Id.*

311. *Id.*

312. Several states have argued that the innocent passage provisions of the Convention do not preclude a coastal state from establishing prior authorization requirements. Thus, upon signing the Convention, a number of countries indicated that they would require prior notification before entry into their territorial seas. Similarly, other states have sought to prohibit the entry of nuclear-powered vessels or ships carrying hazardous materials into their territorial seas. Charney, *supra* note 294, at 992. See generally Lewis Alexander, *Uncertainties in the Aftermath of UNCLOS III: The Case for Navigational Freedoms*, 18 OCEAN DEV. & INT'L L. 333 (1987).

313. UNITED NATIONS, *THE LAW OF THE SEA*, *supra*, note 298, *passim*. In fact, sixteen countries continue to claim a territorial sea in excess of twelve miles. *Id.* at 5.

coastal states to limit innocent passage for navigational safety considerations, or may sea lane restrictions be imposed when necessary for other purposes (e.g., to protect national security)?³¹⁴ According to the State Department, a state can impose sea lane restrictions that limit innocent passage only if they are based on navigational safety considerations.³¹⁵ The State Department noted that Soviet maritime regulations violated the provisions of the 1982 LOS Convention by completely prohibiting the exercise of innocent passage in the Black Sea.³¹⁶ The Soviets, however, indicated that the Russian language text of the Convention did not limit the coastal state to such restrictions. Rather, article 22 gave the coastal state authority to establish sea lanes and traffic separation schemes to regulate innocent passage in territorial waters whenever necessary.³¹⁷ This dispute was a principal cause of the February 1988 bumping incident in the Black Sea.³¹⁸

During negotiations between the United States and the Soviet Union following the bumping incident, differences between the English and Russian language text versions of article 22 were discovered. A subsequent analysis conducted by the Department of State revealed that the Russian language text of article 22, paragraph 1, allows the coastal state to regulate the right of innocent passage whenever necessary.³¹⁹ The English language text of article 22 provides: "The coastal

314. For a detailed analysis of this issue, see William J. Aceves, *Ambiguities in Plurilingual Treaties: A Case Study of Article 22 of the 1982 LOS Convention* (1995) (unpublished manuscript on file with author).

315. See generally OFFICE OF THE SECRETARY OF DEFENSE, *HIGHLIGHTS OF US/USSR BILATERAL TECHNICAL LOS DISCUSSIONS: NAVIGATIONAL ISSUES* (Apr. 26, 1988) (declassified Sept. 24, 1991).

316. Office of Secretary of Defense *Highlights of US/USSR Technical LOS Discussion: Innocent Passage and Other Navigational Issues* (Aug. 23, 1988) (declassified Sept. 24, 1991), at 8.

317. *Id.* at 9.

318. UNITED NATIONS, *THE LAW OF THE SEA*, *supra* note 298, at 123-24. See generally Shao Jin, *The Question of Innocent Passage of Warships: After UNCLOS III*, 13 *MARINE POL'Y* 56 (1989). For a discussion of the Black Sea incident, see *supra* notes 201-34 and accompanying text.

319. Interestingly, of the six official languages on the 1982 LOS Convention, only the Arabic text was identical to the English text. Discrepancies with the English version existed in the Chinese, French, Russian, and Spanish texts. For example, the French text of article 22(1) reads:

The coastal [s]tate may, when the security of navigation so dictates, require foreign ships exercising the right of innocent passage in its territorial sea to use the sea lanes it designates and to abide by the traffic separation schemes it prescribes for the regulation of the passage of ships.

The Spanish text reads as follows:

The coastal [s]tate may, when necessary taking into account the safety of navigation, require foreign ships exercising the right of innocent passage through its

state may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.”³²⁰ In contrast, the relevant Russian text, translated into English, reads as follows:

The coastal state, in the event of necessity and with regard to the safety of navigation, may require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.³²¹

By identifying the lack of concordance in the English and Russian language texts of article 22, the United States and the Soviet Union resolved a significant obstacle in the negotiations regarding innocent passage. Thus, the United States and the Soviet Union were able to focus on the principal issue at stake: the balance between the security interests of the coastal state and the right of innocent passage for warships in the territorial sea. The result was a pragmatic solution. The Soviet Union agreed to amend its border regulations in conformity with the U.S. understanding of article 22. Specifically, it recognized that warships enjoy the right of innocent passage in the territorial sea.³²² In addition, the establishment of sea lanes and traffic-separation schemes was permissible only “where needed to protect the safety of navigation.”³²³ In response, the United States communicated to the Soviet Union that since Soviet border regulations had been amended, it had no reason to exercise its right of innocent passage in Soviet territorial waters.³²⁴

territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.

Department of State Memorandum from Jim Feeney (Sept. 12, 1988) (declassified Aug. 10, 1989).

320. LOS Convention, *supra* note 50, art. 22.

321. Department of State Memorandum from Alexis Obolensky (Sept. 12, 1988) (declassified Aug. 10, 1989).

322. Uniform Interpretation, *supra* note 226.

323. *Id.* State Department officials recognized that the arrangement “constitutes a substantial shift in tradition Soviet views. . . . It would resolve a significant dispute between the United States and the Soviet Union and would promote the United States’ global interests in uniform application of the rules of international law regarding navigation rights.” Action Memorandum from Frederick Bernthal to the Secretary of State (Sept. 5, 1989) (declassified June 5, 1990).

324. Department of State CIRCTEL No. 311861, *supra* note 231. See also *supra* note 232 and accompanying text.

In summary, state practice is important for developing and clarifying ambiguous and indeterminate provisions in the 1982 LOS Convention. According to the U.S. government, the Freedom of Navigation program plays an important role in this process.

B. A Critique of the U.S. Position

Despite its reliance on the principal sources of public international law, the U.S. rationale for the FON program can be criticized on both legal and normative grounds.

1. A Legalist Critique

When a coastal state asserts an objectionable claim, the United States usually delivers a diplomatic protest to that country. If an acceptable resolution is not reached, the United States has felt compelled to assert its legal position by sending its vessels or aircraft through the disputed area. The United States has argued that if it does not protest illegal violations of its rights under international law, such inaction may imply ratification through acquiescence. However, this analysis fails to consider the doctrine of *opinio juris*.

For state practice to become a rule of customary international law, it must appear that states follow that practice from a sense of legal obligation.³²⁵ *Opinio juris* provides a qualitative element to the development of customary international law. As noted in the *Restatement (Third)*, a practice that is generally followed but which states feel legally free to disregard does not contribute to the development of customary international law.³²⁶ Thus, for the United States to be bound by development of a customary norm of international law, it must knowingly and willingly accept the developing norm.

The Permanent Court of International Justice first enunciated the doctrine of *opinio juris* in the *Lotus* case.³²⁷ In the *Lotus* case, France argued that a customary rule of international law had developed regarding criminal prosecution over acts committed aboard vessels on the high seas.³²⁸ Because states had abstained from exercising juris-

325. See generally Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. L.Q. 501 (1995); BROWNLIE, *supra* note 5, at 7-10; HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 379-81 (1958); LUCIA M. MORENO, *LA OPINIO JURIS EN EL DERECHO INTERNACIONAL CONTEMPORANEO* (1991); 1 O'CONNELL, *supra* note 8, at 3.

326. RESTATEMENT (THIRD), *supra* note 243, § 102 cmt. c.

327. *Lotus* (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Oct. 12).

328. *Id.* at 25-26.

diction over such criminal acts, France argued that this practice had developed into a customary norm prohibiting the exercise of jurisdiction.³²⁹ The PCIJ found such evidence of state action insufficient.

Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstentions were based on their being conscious of a duty to abstain would it be possible to speak of an international custom.³³⁰

The International Court of Justice reiterated this doctrine in the *North Sea Continental Shelf* cases.³³¹ In these cases, Denmark and the Netherlands argued that the principle of equidistance for the purpose of maritime boundary delimitation had become a customary rule of international law.³³² The ICJ held that the equidistance principle had not developed into customary international law.

[T]o achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.³³³

In other words, states must feel that they are conforming to what amounts to a legal obligation. Indeed, "[t]he frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience, or tradition, and not by any sense of legal duty."³³⁴ Similarly, in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, the ICJ noted:

[F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice,' but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking

329. *Id.* at 27-28.

330. *Id.* at 28.

331. *North Sea Continental Shelf* (F.R.G v. Den./Neth.), 1969 I.C.J. 4 (Feb. 20).

332. *Id.* at 10-11.

333. *Id.* at 38.

334. *Id.*

such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.³³⁵

Thus, the U.S. assertion that it must act or lose its navigational rights is somewhat misplaced. The doctrine of *opinio juris* is necessary for the development of customary international law. Consequently, the United States cannot be deemed to acquiesce in the formation of customary international law unless it is doing so out of a sense of legal obligation.

In addition, the U.S. legal position may be criticized for its unnecessary reliance on operational protests. Operational challenges are not the exclusive means by which to protest a claim. In the *North Sea Continental Shelf* cases, the International Court of Justice suggested that diplomatic statements would be sufficient to establish a rule of customary international law.³³⁶ If a diplomatic protest is prompt and unequivocal, and if it is accompanied by other legitimate demonstrations by a state to preserve its rights, this protest will suffice to counter the continuity of a developing claim.³³⁷ Indeed, the notion that operational protests are the only means of asserting state practice is the minority position.³³⁸

2. A Normative Critique

In addition to the legalist critique, international law provides normative reasons for criticizing the FON program. These normative criticisms are grounded in the fundamental sources of international law: customary international law, treaty law, and general principles of international law.³³⁹

The February 1988 bumping incident between U.S. and Soviet warships in the Black Sea illustrates the danger of using state practice

335. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 108-09 (June 27).

336. *North Sea Continental Shelf (F.R.G. v. Den./Neth.)*, 1969 I.C.J. 3, 32-33 (Feb. 20).

337. MacGibbon, *supra* note 265, at 319.

338. AKEHURST, *supra* note 247, at 1. *But see* THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS AND READINGS, *supra* note 39, at 42-43.

339. The *Restatement (Third)* provides that "[a] rule of international law is one that has been accepted as such by the international community of states: (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world." *RESTATEMENT (THIRD)*, *supra* note 243, § 102(1).

to determine the status of international law. If a state wishes to assert a particular interpretation, it will seek to manifest its legal position by state practice. If other states are equally firm in their resolve to assert their interpretation by state practice, violent confrontations may result. From a practical perspective, if state practice is necessary for determining the status of international law, this system will prejudice small states that have no practical recourse to operational actions.³⁴⁰

The notion that states must take action which may lead to a violent confrontation or lose their rights under international law is inconsistent with the most basic principles of international law. Article 2(4) of the U.N. Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."³⁴¹ In addition, article 2(3) of the U.N. Charter requires that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."³⁴² The parties to such disputes are required to seek a solution by negotiation, arbitration, judicial settlement, or other peaceful means.³⁴³ If such action fails to settle the dispute, the parties are required to submit the issue to the Security Council.³⁴⁴

The 1982 LOS Convention also requires the peaceful settlement of disputes.³⁴⁵ Article 279 provides that states shall settle any dispute concerning the interpretation or application of the LOS Convention by peaceful means in accordance with article 2(3) of the U.N. Char-

340. The inability of small states to effectively protest U.S. naval incursions is graphically documented in the following passage:

One Navy officer recalled an occasion when his cruiser was ordered to steam near Albania, which claims a 15-mile territorial limit and demands advance notification from approaching ships. Two Albanian hydrofoils . . . reared to within a few hundred feet of the U.S. ship, where they settled into the water . . . facing the cruiser. The [Albanian] ground station barked out the coordinates and demanded a response. 'We cannot locate the target,' one hydrofoil captain responded, and the two boats turned and sped away.

Fred Hiatt, *Four U.S. Navy Jets Challenge Libya's Sovereignty*, WASH. POST, July 27, 1984, at 1. See also Colson, *supra* note 271, at 961.

341. U.N. CHARTER art. 2, para. 4.

342. *Id.* art. 2, para. 3.

343. *Id.* art. 33.

344. *Id.* art. 37.

345. F. David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 667-78 (1984).

ter.³⁴⁶ While the *Corfu Channel* case affirms the assertion of rights doctrine, the ICJ's opinion cannot be read isolated from other principles of international law. In his analysis of the *Corfu Channel* case, J.L. Brierly noted that the conditions for a forcible affirmation of legal rights only exist if the other state is "wrongfully denying by force the exercise of those rights but also unwilling to use pacific means to settle the dispute."³⁴⁷

A study by the Special Working Committee on Maritime Claims of the American Society of International Law recognized the potential for violent confrontation when states seek to affirm their legal position through state action.³⁴⁸ Specifically, the study examined situations where "the coastal state disputes the right of a maritime state to navigate in or fly over an area near the coast."³⁴⁹ According to the Committee:

The coastal state may well regard the foreign power as impermissibly intruding into its territory or maritime zones. The coastal state would be concerned about the loss through acquiescence of its asserted rights off its coast not only as against that maritime state but as against other states. The maritime state is concerned not only about the loss through acquiescence of navigation rights off that particular coastal state but, perhaps more importantly, about the loss of navigation rights off the shores of other coastal states that are encouraged to make or enforce similar claims. In principle, the same rules apply to determine the maximum claims that can be made by all coastal states in the world; if a friendly coastal state's claim is accepted, the validity of a similar claim by an unfriendly coastal state is all but conceded.³⁵⁰

This process leads inevitably towards conflict.

346. LOS Convention, *supra* note 50, art. 279. The LOS Convention offers several forms of dispute resolution. See generally A.O. Adele, *Law of the Sea: The Integration of the System of Settlement of Disputes Under the Draft Convention as a Whole*, 72 AM. J. INT'L L. 84 (1978); E.D. Brown, *Dispute Settlement*, 5 MARINE POL'Y 282 (1981); A.R. Carnegie, *The Law of the Sea Tribunal*, 28 INT'L & COMP. L.Q. 669 (1979); John Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 CONN. J. INT'L L. 675 (1989); Louis Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495 (1975); Yogesh Tyagi, *The System of Settlement of Disputes Under the Law of the Sea Convention: An Overview*, 25 INDIAN J. INT'L L. 191 (1985).

347. BRIERLY, *supra* note 6, at 430.

348. See AMERICAN SOCIETY OF INTERNATIONAL LAW, NONVIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS: THE CASES OF DISPUTED MARITIME CLAIMS AND STATE-SPONSORED TERRORISM (1991).

349. *Id.* at 1.

350. *Id.* at 2.

When a coastal state makes a claim contested by a maritime state, the maritime state typically delivers a diplomatic protest to the coastal state. Each state has now staked out a legal position contested by the other. A new problem arises because each is likely to fear that unless it takes overt actions consistent with its position, over time it will have acquiesced in the assertion of the other. Thus, the maritime state is encouraged to send one or more vessels or aircraft into the area to "enforce" its claimed right to use the area, while the coastal state is encouraged to take military action to "enforce" its claim against foreign ships. The potential for violence is obvious.³⁵¹

The Committee duly noted that theories of international law which require either a coastal state or a maritime state to take affirmative action that may entail a risk of armed conflict, solely to preserve its contested claims, are in tension with the underlying principles and purposes of the United Nations Charter.³⁵² When either the coastal state or the maritime state implicitly or explicitly challenge the other state to enforce its view of the law, both are being unduly provocative. For this reason, the Committee concluded that "[w]hile we believe that neither [state] is compelled to yield its legal position pending an authoritative resolution of the matter, each should seek to minimize, rather than maximize, the chances of a violent reaction by the other."³⁵³

Thus, the use of state practice to affirm a state's position on a disputed issue must be carefully balanced against the ramifications that may arise from such action. While the U.S. Freedom of Navigation operations in the Black Sea ultimately resulted in a successful resolution of the dispute, such actions "carry very real risks of precipitating violent interaction between nations or, at a minimum, generating political ill-will."³⁵⁴

Another issue raised by this analysis is the doctrine of abuse of rights.³⁵⁵ The abuse of rights doctrine has developed gradually in in-

351. *Id.* at 3.

352. *Id.* at 4.

353. *Id.*

354. Aceves, *supra* note 20, at 75; Rolph, *supra* note 142, at 164.

355. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT*, *supra* note 325, at 162-65; HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 286-306 (1933); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 662 (1994). See also IAN BROWNIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I* (1983).

ternational law.³⁵⁶ Early pronouncements of the doctrine were influenced by the principle of good faith.³⁵⁷ The U.N. Charter compels all member states to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."³⁵⁸ In the *Conditions of Admission of a State to Membership in the United Nations* case, the dissenting judges noted that while states have a right to take political considerations into account in deciding whether to grant a state admission to the U.N., every state has an overriding legal obligation "to act in good faith (an obligation which moreover is enjoined by paragraph 2 of article 1 of the Charter.)"³⁵⁹ In addition, article 300 of the 1982 LOS Convention provides that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights."³⁶⁰

The individual opinion of Judge Alvarez in the *Corfu Channel* case presented one of the earliest pronouncements of the doctrine of abuse of rights.³⁶¹ Judge Alvarez noted that the misuse of a right was not originally viewed as a violation of civil law.³⁶² Anyone could exercise his or her rights to the fullest extent possible, even if the effect was prejudicial to others. Moreover, there was no duty to make reparations.³⁶³ Judge Alvarez noted, however, that civil codes had gradually begun to expressly prohibit the misuse of rights in private relations.³⁶⁴ For example, article 226 of the German Civil Code provided that "[t]he exercise of a right is forbidden when it can have no other object than to cause injury to others."³⁶⁵ Similarly, article 2 of

356. The abuse of rights doctrine has also developed in the United States and, particularly, in Louisiana. See generally A.N. Yiannopoulos, *Civil Liability for Abuse of Right*, 54 LA. L. REV. 1173 (1994); Shael Herman, *Classical Social Theories and the Doctrine of Abuse of Right*, 37 LA. L. REV. 747 (1977).

357. For a discussion of the principle of good faith, see generally WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 209-11 (1979); J.F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* (1991); GEORG SCHARZENBERGER, *INTERNATIONAL LAW* 214-16 (1976); Louis Sohn, *Equity in International Law*, 82 PROC. OF THE AM. SOC'Y OF INT'L L. 277 (1988).

358. U.N. CHARTER art. 2, para. 2.

359. *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 91-92 (Advisory Opinion of May 28).

360. *THE INTERNATIONAL LAW OF THE SEA: CASES, DOCUMENTS AND READINGS*, *supra* note 39, at 44.

361. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 47 (Apr. 9) (separate opinion of Judge Alvarez).

362. *Id.*

363. *Id.* at 47-48.

364. *Id.* at 47.

365. *BÜRGERLICHES GESETZBUCH [BGB]* art. 226 (F.R.G.).

the Swiss Civil Code provided that "[e]veryone is bound to exercise his rights and to discharge his obligations according to the rules of good faith. The manifest misuse of a right is not protected by the law."³⁶⁶ Judge Alvarez suggested that these principles of domestic law should be transported into international law "for in that law the unlimited exercise of a right by a State, as a consequence of this absolute sovereignty, may sometimes cause disturbances or even conflicts which are a danger to peace."³⁶⁷ Indeed, on some occasions, "clashes of rights and interests are causes of social unrest and even of wars."³⁶⁸

Referring to the doctrine of abuse of rights and its development in the decisions in the International Court of Justice, Hersch Lauterpacht noted that:

These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however, well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which . . . must be wielded with studied restraint.³⁶⁹

While the abuse of rights doctrine has not yet developed into a general principle of international law, it is consistent with existing principles of good faith, nonviolence, and the peaceful settlement of disputes.³⁷⁰ In this respect, the abuse of rights doctrine is a mere extension of existing norms of international behavior. Thus, a state which engages in conduct that is confrontational in nature and uses military force to assert its rights when nonviolent forms of dispute resolution are available would appear to violate the abuse of rights doctrine.

366. CODE CIVILE SUISSE [ZGB] art. 2 (Switz.). The abuse of rights doctrine is also found in the French, Spanish, and Japanese legal systems. See generally Vera Bolgar, *Abuse of Rights in France, Germany and Switzerland*, 35 LA. L. REV. 1015 (1975); Pierre Catala and John Weir, *Delict and Torts: A Study in Parallel, Part II*, 38 TUL. L. REV. 221, 226-27 (1964); Kazuaki Sono and Yasuhiro Fujioka, *The Role of the Abuse of Rights Doctrine in Japan*, 35 LA. L. REV. 1037 (1975).

367. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 48 (Apr. 9).

368. *Id.*

369. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT*, *supra* note 325, at 164.

370. According to the *Restatement (Third)*, "[g]eneral principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate." RESTATEMENT (THIRD), *supra* note 243, § 102(4).

C. *Summary*

In the final analysis, the validity of the Freedom of Navigation program must be measured by reference to both legal and political norms. Certainly, international law provides an arguable basis for the FON program. State practice is relevant to the development of customary international law and the interpretation of treaties. In practice, the FON program has influenced the development of international law, as evidenced by the successful resolution of the Black Sea incident. It should also be recognized that hundreds of FON operational challenges have been conducted without incident.

And yet, if the purpose of international law is to minimize state conflict and the potential for violent confrontation, the legitimacy of the Freedom of Navigation program must be questioned. FON operational challenges are inherently confrontational precisely because they challenge disputed claims. As previously indicated, when both states are equally firm in their resolve to assert their legal position by state practice, violent confrontations may occur. Moreover, the notion that state practice is required to challenge disputed claims is prejudicial to states that are unable to conduct such operations. In this case, therefore, might makes right.³⁷¹ Thus, where both parties seek to affirm their legal positions through state practice, they should be obligated to seek dispute settlement. Indeed, international law should not be used to support such confrontational practices. To do so is contrary to the most basic principles of international law.

This does not suggest, however, that the Freedom of Navigation program should not remain an integral component of U.S. maritime policy. In addition to operational challenges, the FON program also consists of bilateral and multilateral efforts that affirm U.S. navigational rights. The United States should continue to pursue these diplomatic efforts. However, it should not engage in maritime operations merely to assert U.S. navigational rights in disputed waters. If other foreign policy interests require maritime operations in disputed waters, these operations should then be conducted. Until such time, the United States should seek diplomatic solutions, and not engage in confrontational behavior.

371. See generally LOUIS HENKIN ET AL., *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed., 1991).

V. Conclusion

This study recognizes the dynamic relationship between law and politics. On the one hand, international law is shaped and influenced by the diverse interests and political concerns of the international community.³⁷² According to Morton Kaplan and Nicholas deB. Katzenbach, "[l]aw exists, and legal institutions operate, only in particular political contexts."³⁷³ Similarly, Louis Henkin acknowledged that the separation of law and politics is illusory.³⁷⁴ "In a larger, deeper sense, law *is* politics. Law is made by political actors, not by lawyers, through political procedures, for political ends. The law that emerges is the result of political forces as are the influences of law on state behavior."³⁷⁵ Thus, the influence of politics on law is significant.

On the other hand, the influence of international law on politics is equally significant. The law establishes a framework for international issues, giving them form and character. Through this process, it establishes parameters of acceptable conduct. As international law becomes more formalized and institutionalized, it gains a greater ability to influence state behavior. Indeed, international institutions have the capacity to improve interstate cooperation by reducing transaction costs, increasing transparency and information flows between states, and monitoring compliance.³⁷⁶ In this manner, international institutions influence state behavior and mitigate the consequences of an anarchic international system where state behavior is typically motivated by egoistic self-interest.

This dynamic, where law and politics interact, is clearly evident in the Freedom of Navigation program—where the United States closely

372. See OLIVER LISSITZYN, *INTERNATIONAL LAW TODAY AND TOMORROW* 4 (1965) (suggesting that international law is used as an instrument of policy, either of cooperation or of conflict); G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 273 (William Butler trans., 1974) (recognizing that in the creation or alteration of norms of international law, each state strives to have the principles of its foreign policy reflected and secured as fully as possible into international law).

373. MORTON KAPLAN & NICHOLAS DEB. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* v (1961).

374. Louis Henkin, *Law and Politics in International Relations: State and Human Values*, 44 J. INT'L AFF. 183 (1990).

375. *Id.* at 183 (emphasis in original).

376. The literature on regime theory and institutionalism describes how formal and informal international institutions can successfully regulate state behavior. See generally *INSTITUTIONS FOR THE EARTH* (Peter Haas et al. eds., 1993); *COOPERATION UNDER ANARCHY* (Kenneth Oye ed., 1986); ROBERT KEOHANE, *AFTER HEGEMONY: DISCORD AND COLLABORATION IN THE WORLD POLITICAL ECONOMY* (1984); *INTERNATIONAL REGIMES* (Stephen Krasner ed., 1983).

guards navigation and overflight rights throughout the world's seas and oceans under the rubric of the freedom of the seas. Indeed, the dialectic interaction between law and politics creates a unique relationship. In the *Corfu Channel* case, Judge Alvarez noted that social interdependence does not place law in opposition to politics. Rather, there is a close relationship between the two. According to Judge Alvarez:

[P]ure law does not exist: law is the result of social life and evolves with it; in other words, it is, to a large extent, the effect of politics—especially of a collective kind—as practiced by the States. We must therefore beware of considering law and politics as mutually antagonistic. Each of them should be permeated by the other.³⁷⁷

This Article has identified the impact of legal norms on state behavior as well as the impact of state behavior on the development of legal norms. Both scholars and practitioners must recognize this fundamental interaction which underlies all international behavior.

377. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 41-42 (Apr. 9).